89-1225

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

D. MICHAEL KRATCHMAN
(Counsel of Record)
2500 Buhl Building
535 Griswold
Detroit, Michigan 48226
(313) 963-9625
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment oust the courts of a State (and the federal courts sitting therein) of jurisdiction over a claim by that State's resident against a nonresident for intentional fraud committed in a commercial agreement which was negotiated across State lines and signed by each party in its own State?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 885 F.2d 1293, and is reprinted at pp. 1-30 of the separately bound Appendix ("App."). The opinions of the United States District Court for the Eastern District of Michigan are not reported and are reprinted at App. 34-47, 48-67 and 68-75.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1989. App. 32. The Court of Appeals denied petitioner's timely Petition for Rehearing with a Suggestion for Rehearing En Banc on November 2, 1989. App. 31. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty or property, without due process of law * * *

STATEMENT OF THE CASE

This case arises from respondent Deer Creek Enterprises' ("Deer Creek", an Indiana general partnership) fraud and breach of contract (as found after trial) in a multimillion dollar sale of real property to Beznos Realty Investment Co. ("Beznos Realty"), a Michigan partnership.[1] After preliminary discussions in Florida, where the property is located, Deer Creek and Beznos Realty negotiated the property's sale by mail and telephone between Indiana and Michigan over the course of several months. An agreement was reached, executed by each party in its own State, in which Deer Creek made material misrepresentations about the number of rental units which could legally be constructed on the property. When Beznos Realty discovered Deer Creek's fraud and its Michigan principal and counsel sought an adjustment of the terms of the agreement to reflect the reduction of units available, Deer Creek refused to do so in a letter addressed to Beznos Realty in Michigan, and demanded that the latter take the property "as is." App. 10.

LAK, Inc., Beznos Realty's successor (see n.1), filed suit in the United States District Court for the Eastern District of Michigan, invoking that court's diversity jurisdiction under 28 U.S.C. § 1332. The District Court denied Deer Creek's motion to dismiss for lack of personal jurisdiction. App. 34-47. A jury expressly found that Deer Creek had intentionally misrepresented the property's building capacity, and that Beznos Realty had

---

[1] Petitioner LAK, Inc. ("LAK"), a Michigan corporation is the successor in interest to Beznos Realty. App. 10.

reasonably relied on the misrepresentations in agreeing to purchase the property.[2] The District Court entered judgment for LAK, granting specific performance, the relief LAK had sought. The Court of Appeals reversed the District Court's judgment on the ground that Deer Creek's contacts with Michigan were constitutionally insufficient to sustain jurisdiction on either the fraud or contract claims.

A. The Transaction

Beznos Realty is a Michigan entity in the business of acquiring and developing real property. In November 1983, Beznos Realty's property acquisition manager, Al Beke, learned that Deer Creek wished to sell a 45-acre parcel of land near Boca Raton, Florida. App. 3. The parcel was undeveloped except for a small eight-unit apartment and had considerable promise for development. *Id.*

Following Beke's initial contacts with a Deer Creek representative, Harold Beznos (a Michigan resident and Beznos Realty principal) met several times in Florida with Mark and Hart Hasten, Indiana residents and principals in Deer Creek, to discuss a possible sale. App. 4. Beznos then returned to his office in Michigan in January 1984 and continued to negotiate. *Id.* Additionally, "certain warranties and other substantive terms of the deal were negotiated by attorneys rather than by the principals directly." *Id.* In February 1984, the Hastens' attorney and agent, Stephen Backer, sent a draft Purchase Agreement from Indianapolis, Indiana, to Beznos, who provided it to his attorney, Michael Mehr, in Detroit, Michigan. App. 5. Telephonic negotiations of the draft Purchase Agreement followed between Mehr, in Detroit, and Backer, in Indianapolis. As the Court of Appeals noted, "[t]he two lawyers had a number of

[2] The jury's special verdict form is reprinted at App. 76-80.

telephone conversations * * * in the latter part of February, and the agreement went through three additional drafts. Typed copies of these drafts were prepared in Mr. Backer's office in Indianapolis and were mailed to Mr. Mehr's office in Detroit." App. 5.

The Purchase Agreement in final form recited that Beznos Realty was a Michigan partnership (App. 6), and required Deer Creek to convey good, marketable, and insurable title in fee simple. App. 8. Among the essential elements of the Agreement hammered out in the Michigan-Indiana mail and telephone exchanges was Item 8, entitled "Seller Representations and Warranties."[3] That provision stated in relevant part:

> Seller hereby represents, covenants and warrants to Purchaser as follows:
>
> * * * *
>
> (8) (g) That the Property is currently zoned to permit the construction of 532 units, and 532 units shall be available to the property in accordance with an appropriate site plan, as long as Purchaser complies with all appropriate laws and regulations governing the development of the Property.
>
> * * * *
>
> (8) (k) That all Broward County and City of Deerfield Beach impact fees have been paid based upon the equivalent of 532 residential units as of the closing, and Purchaser's use of the Property (construction of 532 multifamily dwelling units) will not result in an assessment of additional impact fees against Purchaser.
>
> (k) (i) The Deer Creek Improvement Association shall approve a site plan for 532 units on the property.

---

[3] The Court of Appeals observed that much of this language was "proposed by Attorney Mehr, in Detroit, and accepted by Attorney Backer, in Indianapolis." App. 8.

> (k) (ii) That the City of Deerfield Beach shall approve a site plan consistent with its laws and regulations for 532 units.[4]

After agreeing to these terms, Beznos signed the agreement in Michigan on February 29, 1984, and Hasten signed it in Indiana on March 2. App. 6. Thereupon, Beznos Realty was to pay $275,078.10 (of the total $5,501,562.00 purchase price) as earnest money. App. 7. Closing was to take place 60 days from Hasten's signature, with a conditional right of extension for another 30 days. *Id.* Beznos Realty paid the earnest money with a check drawn on a Michigan bank and began to search for financing. *Id.* That search was the subject of several telephone conversations between Mr. Beznos in Michigan and Mr. Hasten in Indiana. App. 4.

Shortly before the parties put the Purchase Agreement in final form, the City of Deerfield Beach agreed to Deer Creek's earlier request for allocation of 508 housing units on the property. App. 9. When Beznos Realty submitted a 540-unit site plan[5] on April 10, 1984, however, the city rejected the plan because, in the city's words, "the proposed number of units exceeded the 508 unit cap * * *." *Id.*

The substantial shortfall in units was critical, because it limited the proceeds which Beznos Realty could expect from development and rental of the property. When the city refused to recede from its position, Mr. Beznos requested that Deer Creek take a *pro rata* abatement of the purchase price to reflect the shortfall. App. 10. Nevertheless, Deer Creek insisted, as the Court of Appeals' acknowledged, that "Beznos 'take the property as

---

[4] The Purchase Agreement is at pp. 201-225 of the parties' Joint Appendix in the Court of Appeals ("J.A."). The quoted portion is at J.A. 212.

[5] The 540-unit plan contemplated construction of 532 housing units in addition to the eight rental units already in existence. App. 9.

is,' with 'no reduction of price period.'" *Id.* "On May 1, 1984, attorney Backer sent a letter to Beznos Realty's lawyers in Detroit confirming that '[t]he Hastens will not reduce the purchase price due to the Purchaser's inability to receive approval to construct 532 units on the Cypress Parcel.'" *Id.* Beznos then assigned its interest to LAK, which filed the present suit. *Id.*

B. Proceedings in the District Court

LAK's complaint alleged breach of contract and fraud. Count III, the fraud claim, alleged that the representations set forth in Sections 8(g) and 8(k)-k(ii) of the Purchase Agreement were knowingly false, and were designed to induce the purchaser to enter into the Purchase Agreement. App. 11; J.A. 18-19.

LAK asserted personal jurisdiction over Deer Creek under Michigan Comp. Laws § 600.725, which provides for "limited" personal jurisdiction over foreign partnerships upon "(1) the transaction of any business within the state, or (2) the doing or causing of any act to be done, or consequences to occur, in the state, resulting in an action for tort."[6] App. 13. Deer Creek moved to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), and the District Court denied that motion. App. 34-47. The parties then proceeded to trial before a jury. The jury returned a special verdict on September 12, 1986 which found that Deer Creek had made knowing, material misrepresentations of fact as to the number of units which could be constructed on the property[7], and that LAK had reasonably relied on those

[6] LAK effected service of process on Deer Creek by having a process server hand serve Mr. Hasten at Deer Creek's Indianapolis office. App. 11.

[7] The special verdict found that Deer Creek (1) "made the representation knowingly and without regard for its truth or falsity or (2) [told] LAK that it had knowledge that the representation was true, while not having such knowledge." App. 77-79.

misrepresentations in entering into the Purchase Agreement. App. 77-79. The jury also found that Deer Creek had materially breached its contract with LAK. App. 76-77. The District Court accepted the jury's recommended remedy and awarded specific performance (with an abatement in the purchase price if LAK was unable to secure city approval for increased density)[8] in a Memorandum Opinion and Order, and Judgment, both dated October 31, 1986. App. 68-75. In the course of ruling on post-trial motions, that court filed memorandum opinions adhering to its pervious ruling on personal jurisdiction and sustaining the jury's verdict. App. 48-67. Respondent filed a notice of appeal on March 26, 1987.

C. The Court of Appeals' Opinion

The Court of Appeals reversed the District Court's rulings as to personal jurisdiction. The court held that Deer Creek's lengthy telephonic and mail contract negotiations with Beznos Realty in Michigan were insufficient in number and quality to create personal jurisdiction. App. 18-20, 23-24. As to jurisdiction over LAK's fraud claim against Deer Creek, the court held that in light of the contacts stemming from the contract's negotiation and execution LAK was required to prove misrepresentations "actually made in the forum state." App. 26. The court then concluded that Deer Creek's negotiations with LAK concerning the number of units available on the property fell short under this test because they were not *themselves* shown to be misrepresentations and because the agreement (signed by Beznos Realty in Michigan) did not become binding until it was signed by Deer Creek in Indianapolis. App. 27.

---

[8] At trial, LAK had stressed that it did not seek damages, only specific performance, and the jury's verdict reflected that in finding no monetary damages from Deer Creek's fraud. App. 72-75; J.A. 281-82.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided an Important and Recurring Constitutional Question in a Manner Wholly Inconsistent With the Decisions of This Court.

The Court of Appeals' holding that a federal court sitting in Michigan is without jurisdiction over a claim by a Michigan plaintiff for intentional fraud committed by an out-of-state defendant in an agreement between the parties is wholly inconsistent with the recent decisions of this Court which have refined the modern principle that the

> Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). [*Calder* v. *Jones*, 465 U.S. 783, 788 (1984).]

Those decisions establish that a defendant has sufficient contacts with a jurisdiction when it commits a tort knowing that it will have adverse consequences on a plaintiff resident of that jurisdiction.

In *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984), this Court declared it to be "beyond dispute that [a State] has a significant interest in redressing injuries that actually occur within the State." The Court quoted with approval a Comment from the Restatement (Second) of Conflict of Laws:

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which

> are the proximate result of his tort. [*Id.* § 36, Comment c, (1971), quoted at 465 U.S. 776, reference to a lower court decision and quotation marks omitted.)

This principle was applied and elaborated in *Calder* v. *Jones*, 465 U.S. 783 (1984), decided on the same day. There, the Court sustained California's jurisdiction over a claim by a California resident against two nonresident individuals for defamation in an article which was circulated in California and injured her in that State. The Court made clear that a "plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction [citing *Keeton*], but they may be so manifold as to permit jurisdiction when it would not exist in their absence." *Id.* at 788. As the Court detailed,

> * * * California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-298 (1980); Restatement (Second) of Conflict of Laws § 37 (1971). [465 U.S. at 788-89, footnote omitted.]

In rejecting the nonresident defendants' contention that they should not be subject to suit in California merely because they could " 'foresee' that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction" (*id.* at 789), this Court stressed that they intentionally engaged in allegedly tortious activity which they knew would injure the plaintiff in California:

> [Petitioners'] intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which

> the [publication wherein the article appeared] has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. * * * *An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.* [465 U.S. at 789-90, emphasis added, citations omitted.]

This Court undertook a comprehensive discussion of the due process standards which govern personal jurisdiction over nonresidents in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985) (*"Burger King"*)—a decision which, as shall appear, the court below seriously misapprehended. See pp. 11-13, *infra*. In reiterating "several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents" (*id.* at 473), the Court reaffirmed that a "State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 473, citing *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957), and *Keeton*, *supra*. But the Court cautioned that "[n]otwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Id.* at 474. Accordingly, " 'the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " *Id.* at 474, quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

The *Burger King* opinion then explained with great care how the courts are to determine "that a potential defendant should " 'reasonably anticipate' out-of-state litigation." 471 U.S. at 474. The nub of the matter is that " 'it is essential in each case that there be some act

by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id.* at 475, quoting *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). *Burger King* continued:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, * * * or of the "unilateral activity of another party or a third person," * * *. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. [471 U.S. at 475, emphasis in original, citations omitted.]

The Court then expanded on this test in terms which are directly applicable and controlling in the instant case:

> Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, *it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.* So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton* v. *Hustler Magazine, Inc.*, *supra*, 465 U.S. at 774-775; see also *Calder* v. *Jones*, 465 U.S. at 788-790; *McGee* v. *International Life Insurance Co.*, 355 U.S. at 222-223. Cf. *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313, 317 (1943). [471 U.S. at 476, emphasis added.]

In holding that Michigan was without jurisdiction over plaintiff's fraud claim, the court below wholly misunder-

stood the rationale of the "reasonable foreseeability" test as applied to modern commercial practice—of which the transaction at issue here is paradigmatic. It cannot possibly be germane to the Due Process considerations which this Court explicated in *Burger King* and its antecedents, whether an agreement which is negotiated and executed across State lines is signed first by the party in the forum State and then by the party in the other State, or in the reverse order; both must occur for the agreement to be binding on either party. Yet, the court below deemed it significant that both plaintiff's principal and its counsel "have acknowledged [that] the contract became binding only when it was signed in Indianapolis." App. 27.[9]

The Court of Appeals' fundamental misunderstanding of the "purposeful availment" test is manifest at the very outset of its analysis, where it focused on the question of jurisdiction over the contract claims. That court determined that respondent did not "reach out" to Michigan because "Deer Creek * * * did not advertise the Cypress parcel for sale in Michigan or elsewhere [and] had no 'program' for seeking out prospective buyers in Michigan." App. 18-19, footnote omitted. But once Beznos approached Deer Creek, the latter knowingly and willingly entered into negotiations with this Michigan partnership and communicated by telephone and mail across state lines with its principal and attorney, who were lo-

---

[9] Indeed, if the sequence could possibly matter to the "foreseeability" analysis—and we say that it cannot—it would be noteworthy that when Deer Creek executed the agreement, the fact that Beznos had previously done so in Michigan again brought home to Deer Creek the knowledge that it was committing a fraud on a *Michigan* entity. And since the fraud was contained in the agreement itself, it cannot be even remotely relevant to the rationale of *Burger King* that the record does not show "that any misrepresentations were made in the course of [the particular] conversation," during which Beznos' lawyer proposed to Deer Creek's lawyer that language providing for 532 additional units be put into the contract—as it was. App. 27.

cated in that State; this culminated in an agreement between the parties wherein, as was found at trial, Deer Creek intentionally defrauded Beznos, injurying it in Michigan. Thus, Deer Creek had fair warning that it could be sued in Michigan and had ample opportunity to avoid that State's jurisdiction by simply refusing to deal with Beznos. Under these circumstances, there can be no constitutional justification for depriving Michigan of jurisdiction over the fraud claim which eventuated from this transaction. For, as the Court made clear in *Burger King*:

> By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). [471 U.S. at 472.]

Interstate commercial transactions such as those typified by the case at bar are pervasive in today's economy. The considerations of "fair play and substantial justice" which animate this Court's due process holdings are ill served by restrictive jurisdictional rulings which preclude a party from obtaining relief in the courts of its own State for an intentional fraud arising out of a transaction willingly entered into across State lines by the nonresident defendant. Moreover, the decision below departs so sharply from the governing constitutional principles which this Court has established, that it will inevitably encourage nonresident defendants to mount jurisdictional challenges in the lower State and federal courts in interstate commercial fraud cases. In order to forestall this unnecessary litigation, and to vindicate the constitutional holdings which this Court has painstakingly delineated, the decision below should be reviewed and reversed.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

D. MICHAEL KRATCHMAN
(Counsel of Record)
2500 Buhl Building
535 Griswold
Detroit, Michigan 48226
(313) 963-9625
Attorney for Petitioner

No. _____

In The

Supreme Court of the United States

October Term 1989

LAK, INC.,

Petitioner,

vs.

DEER CREEK ENTERPRISES,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

D. MICHAEL KRATCHMAN
(Counsel of Record)
2500 Buhl Building
535 Griswold
Detroit, Michigan 48226
(313) 963-9625

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

89 PH

TABLE OF CONTENTS

APPENDIX

No. 87-1321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAK, INC., *Plaintiff-Appellee,* v. DEER CREEK ENTERPRISES, *Defendant-Appellant.*	)))))))	ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed
September 20, 1989

Before: NELSON and BOGGS, Circuit Judges, and EDWARDS, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. This is an appeal from a judgment entered by a federal district court in Michigan in an action against an Indiana partnership on a contract for the sale of a valuable tract of land in Florida. The plaintiff is a Michigan corporation, and the federal courts have subject matter jurisdiction under 28 U.S.C. § 1332. The defendant partnership was never present in Michigan, however, it never consented to be sued there, and it has insisted from the outset of the litigation that it never invoked the benefits and protections of Michigan's laws by purposefully availing itself of the privilege of transacting business in that state. The first question we must address, therefore – a question that is dispositive of the appeal, as it turns out – is whether the facts established by the plaintiff corporation justified the district

court's exercising jurisdiction over the person of the defendant partnership.

The district court concluded (a) that the case came within the terms of Michigan Comp. Laws § 600.725 (the section of Michigan's long-arm statute dealing with "limited" personal jurisdiction over partnerships) and (b) that such personal jurisdiction could be exercised without violating the defendant's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments. A timely motion to dismiss the complaint for want of *in personam* jurisdiction was denied, and the district court ultimately went on to enter a decree of specific performance against the defendant.

We believe that the jurisdictional question was decided incorrectly, in light of the particular facts presented here, and we shall reverse the judgment for that reason.

I

The Supreme Court has rejected any resort to "talismanic jurisdictional formulas" for resolving questions of personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985). Instead, " ' the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.' " *Id.* at 485-486, quoting *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978). We are therefore prompted to sketch out the facts of the present case in somewhat greater detail than might have been necessary had the case arisen at an earlier stage in the development of our jurisprudence.

Defendant Deer Creek Enterprises is an Indiana general partnership formed by two brothers, Mark and Hart Hasten. Both of the Hastens are residents of Indiana. Their Deer Creek partnership has its principal place of business in Indianapolis, Indiana. Deer Creek transacts no business in Michigan, according to an affidavit signed by Mark Hasten, nor has it ever transacted business in that state. Deer Creek has no real or personal property in Michigan, and there is no contention that it ever designated an agent to accept service of process there.

At the time with we are concerned in this proceeding, Deer Creek had substantial real estate holdings in Florida. It owned, among other things, a 45-acre tract of land known as the "Cypress parcel." This particular parcel, which is located in a residential area between Boca Raton and Ft. Lauderdale, Florida, was unimproved by any buildings other than a small eight-unit apartment structure. The land had considerable potential for development, it appears.

Deer Creek did not advertise the Cypress parcel for sale, either in Michigan or elsewhere. In November of 1983, however, Deer Creek's Florida representative, Mr. Richard Jerman, received an unsolicited inquiry about a possible purchase of the parcel by Beznos Realty Investment Company, a Michigan limited partnership that was the predecessor in interest of plaintiff LAK, Inc. The property acquisition manager for Beznos Realty, Mr. Al Beke, met with Mr. Jerman in Florida on November 17, 1983. On the following day Mr. Jerman was giving a letter of intent, signed by Mr. Beke on behalf of the Beznos organization, proposing to purchase part of the parcel.

Messrs. Beke and Jerman had several subsequent meetings in Florida, and they spoke over the telephone at times when Beke was in Michigan and Jerman in Florida. At no point did Mr. Jerman or any other representative of Deer Creek go into the State of Michigan on business related to this matter.

On two occasions in the latter part of December, 1983, Mr. Harold Beznos, one of the principals of Beznos Realty, met in Florida with the Hasten brothers, at the latters' invitation, to discuss the proposed purchase. Mr. Beznos met again with Mark Hasten in Florida on January 4, 1984, and an affidavit subsequently signed by Mr. Beznos says of this meeting that "we continued to negotiate the specifics of a real estate transaction. . . ."

Mr. Beznos returned to his home in Michigan shortly after the January 4 negotiating session, and he had further discussions with Mark Hasten and other representatives of Deer Creek over the telephone.[1] In February of 1984 – around the time of yet another meeting between

---

[1] A supplemental affidavit of Mr. Hasten says "we did not negotiate the substantive terms of the Purchase Agreement for the sale of the Cypress parcel in any of the telephone conversations. The substantive terms of the Purchase Agreement were all negotiated in Florida during face-to-face meeting with Harold Beznos." A responsive affidavit of Mr. Beznos says, and other evidence confirms, that certain warranties and other substantive terms of the deal were negotiated by attorneys, rather than by the principals directly. Mr. Beznos also had telephone conversations from Michigan with Mr. Hasten about the purchaser's contractual obligation to secure financing from a third party.

Messrs. Beznos and Hasten in Florida – Mr. Hasten instructed his lawyer in Indianapolis, Mr. Stephen Backer, to draw up a contract for the sale to Beznos Realty of the entire Cypress parcel.

On February 13, 1984, Attorney Backer dispatched a draft purchase agreement by Federal Express to Harold Beznos at the Biltmore Hotel in Phoenix, Arizona. It was subsequently learned that Mr. Beznos had left Phoenix, and on February 15 a second copy was sent to him at a hotel in Beverly Hills, California. (The record suggests that Mr. Beznos traveled extensively, and at various times he communicated with Deer Creek by telephone from Canada, Mexico, Texas, New York, Arizona and California, as well as from Michigan. Some of these calls evidently dealt with the third-party financing that was being arranged by Beznos, and others concerned matters having nothing to do with the Cypress parcel.)

Mr. Beznos gave the draft purchase agreement to his lawyer in Detroit, Mr. Michael Mehr, who promptly placed a telephone call to Attorney Backer in Indianapolis. The two lawyers had a number of telephone conversations over the telephone in the latter part of February, and the agreement went through three additional drafts. Typed copies of these drafts were prepared in Mr. Backer's office in Indianapolis and were mailed to Mr. Mehr's office in Detroit. Unlike their principals, who had met several times in Florida, the lawyers never met face-to-face; all of their communications with one another were conducted by telephone or in writing.

Attorney Mehr's affidavit makes the point that "[n]o agreement to purchase and sell existed between the parties until the matters negotiated by me and Stephen Backer were expressed in the written Purchase Agreement." The affidavit of Mr. Beznos, similarly, says that "[n]o agreement to purchase the Deer Creek parcel existed until the matters set forth in the written Purchase Agreement were finalized." A revised copy of the purchase agreement was signed by Mr. Beznos in Michigan on February 29, 1984, and the document was then sent to Indiana for signature by Mr. Hasten. The purchase agreement was "finalized," in the sense that it became legally binding, only when Mr.. Hasten signed it on behalf of Deer Creek. That signing occurred on March 2, 1984, in the State of Indiana.

The purchase agreement, which recited that Deer Creek was an Indiana general partnership, that Beznos Realty was a Michigan partnership, and that the land which formed the subject of the agreement was located in Florida, provided by its terms that the agreement was to be governed by the law of the *situs* state, Florida. (We pause here to note, parenthetically, that the agreement's Florida choice-of-law provision is by no means irrelevant to the question of personal jurisdiction. *Burger King*, 471 U.S. at 481. "Nothing in our cases," the Supreme Court has said, "suggests that a choice-of-law provision should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes." *Id.* at 482 (emphasis omitted). A showing that Deer Creek purposefully availed itself of the benefits and protections of Michigan law is essential to the plaintiff's jurisdictional claim, as

we shall see, and this essential showing is not helped by the fact that the parties chose to have the contract governed by the law of Florida, rather than the law of Michigan. The parties having elected to invoke the benefits of Florida law for deciding disputes under the contract, there is obviously much to be said in favor of letting such disputes be resolved in a Florida court.)

The agreement specified a purchase price of $5,501,562.00, to be paid by cash or certified check at the time of closing. It also provided that upon acceptance of the agreement by Deer Creek, Beznos Realty would tender $275,078.10 as earnest money. The latter sum, it was agree, would be held until the closing in an account at a designated bank in Indianapolis. (The earnest money, in the form of a check drawn on a Michigan bank, was duly received by the Backer firm in Indiana and was deposited by it in the Indianapolis Bank.) The closing was to be held with in 60 days, subject to a conditional right of extension for 30 days; the closing was to take place in the State of Florida.

Beznos Realty retained a right to terminate the agreement and recover the earnest money if it could not obtain a satisfactory loan commitment from the Atlanta and New York officers of Metropolitan Life Insurance Company. (An agreement negotiated by telephone on April 3, 1984, and agreed to by Mark Hasten in writing on May 5, provided for a 30-day extension of the closing date if a loan commitment were received from "any lender;" on April 26, 1984, Beznos Realty signed a loan commitment agreement with Lomas & Nettleton Financial Corporation, a mortgage banker with a regional office in Atlanta and headquarters in Texas.

The purchase agreement did not require either Deer Creek or Beznos Realty to take any action in the State of Michigan. Neither did it provide for any significant continuing relationship of the sort that the seller's retention of a purchase money mortgage might have entailed, for example. The agreement did, however, give Beznos Realty an option to purchase golf club membership in a facility in which Deer Creek had an interest. (The golf club was located near the Cypress parcel.) Exercise of this option would also give Beznos Realty a right to obtain social memberships in a nearby tennis club operated by Deer Creek. Under certain circumstances, the memberships in these Florida recreation facilities could be held open for as long as four years.

Deer Creek undertook to convey good, marketable and insurable title to the Cypress property, in fee simple, and obligated itself to provide, in addition to title insurance, a survey meeting the minimum standards of the Florida Board of Land Surveyors. A section of the agreement entitled "Seller Representations and Warranties" set forth a lengthy series of additional vendor's covenants. The first one that is significant here recited that "the Property is currently zoned to permit the construction of 532 units, *and 532 units shall be available to the property in accordance with an appropriate site plan,* as long as Purchaser complies with all appropriate laws and regulations governing the development of the Property." (emphasis supplied.)

The language set out in italics was appended to the purchase agreement as a footnote. Testimony presented at trial established that the language of the footnote was proposed by Attorney Mehr, in Detroit, and accepted by

Attorney Backer, in Indianapolis. Mr. Backer also accepted proposals for the addition of footnotes reciting that both a local improvement association and the municipality in which the property was situated (the City of Deerfield Beach, Florida) would approve site plans for 532 housing units. These provisions presumably reflected representations that Deer Creek had made to Beznos Realty directly, but we have not been able to ascertain whether any such representation was made to Beznos Realty in Michigan.

Shortly before the purchase agreement was finalized, according to Mr. Jerman's testimony, the City of Deerfield Beach agreed to an earlier request for allocation of a total of 508 housing units to the Cypress parcel. The zoning itself would have accommodated a substantially higher number, but a 540-unit site plan[2] that Beznos Realty's Mr. Beke submitted to Deerfield Beach on April 10, 1984, was rejected by the city because, in the city's words, "the proposed number of units exceeded the 508 unit cap. . . ."

The parties disagree as to when and how the 508-unit cap was supposed to be raised, and they disagree as to whether Mr. Beke botched the job of persuading the city to raise it. (The district court's final judgment, which was entered on October 31, 1986, ordered defendant Deer Creek to obtain approval for the construction of 532 new units on pain of having the purchase price reduced by $10,188 per unit for each unit short of that number. Deer

---

[2] The 540-unit plan contemplated the construction of 532 housing units in addition to the eight apartment units already in existence.

Creek promptly sought such approval, and later submitted evidence to the district court that on January 27, 1987, the Deerfield Beach City Commission decided to support construction of all of the additional units requested.)

No such decision by the city was forthcoming before the scheduled closing date, which had been extended to May 31, 1984, and the parties could not agree on how much of the purchase price ought to be paid over to Deer Creek at the time of closing. Mr. Beznos testified that he called Mr. Hasten and proposed putting approximately $300,000 of the agreed price in escrow until it was determined whether the total number of units permitted would be 540 or 508. Mr. Hasten rejected this proposal, according to the testimony, insisting that Beznos "take the property as is," with "no reduction of price period. . . ." Hasten maintained that Beznos could get city approval for the additional units after the closing; Beznos was unwilling to pay the full price on the basis of such an assumption.

On May 1, 1984, attorney Backer sent a letter to Beznos Realty's lawyers in Detroit confirming that "[t]he Hastens will not reduce the purchase price due to the Purchaser's inability to receive approval to construct 532 units on the Cypress Parcel." Beznos Realty then assigned its interest in the purchase agreement to LAK, Inc. Two weeks before the scheduled closing date, LAK filed the present lawsuit in the United States District Court for the Eastern District of Michigan.

In its complaint, LAK asserted that Mr. Backer's letter of May 1 constituted an anticipatory breach of the

purchase agreement; the letter, LAK claimed, "repudiate[d] the representations, covenants, and warranties . . . that an additional 532 units would be allowed to be erected on the property. . . ." The complaint also alleged that the representations that the 532 units would be available were knowingly false when made. The complaint sought declaratory relief under Florida law, a decree of specific performance compelling transfer of the Cypress parcel at a price dependent on the number of units approved by the City of Deerfield Beach, Florida, and a judgment for money damages, including exemplary and punitive damages.

The plaintiff attempted to effect service on defendant Deer Creek by having a process server hand a summons and a copy of the complaint to Mark Hasten at the Deer Creek office in Indianapolis, Indiana.[3] Deer Creek promptly filed a motion to dismiss, contending that Deer Creek "lacks sufficient contact with the State of Michigan

---

[3] Service beyond the territorial limits of Michigan could not be effective, under Rule 4(f), Fed. R. Civ. P., unless extraterritorial service was authorized by the law of the State of Michigan. See Rule 4(c)(2)(C)(1), Fed. R. Civ. P. The Michigan Court Rules that were in effect at the time of the purported service on Deer Creek said that there was no territorial limitation on the range or service upon a person having any of the relations with the state specified in the Michigan long-arm statute, see Mich. Gen. Ct. R. 1963, 105.9, but Michigan courts have routinely granted motions to quash extraterritorial service of process where personal jurisdiction is lacking. See *e.g.*, *Khalaf v. Bankers & Shippers Ins. Co.*, 62 Mich. App. 678, 233 N.W.2d 696-697 (1975), *aff'd*, 404 Mich. 134, 273 N.W.2d 811 (1978).

for this court to assert *in personam* jurisdiction over defendant consistent with the due process requirements of the United States Constitution." The district court denied the motion to dismiss, and the case eventually went to trial before a jury.

The jury returned a special verdict finding that there had been a material breach of contract and material misrepresentations by Deer Creek, but finding also that the plaintiff had suffered no damage as a result. The jury recommended an award of specific performance without an award of damages. The court accepted this recommendation and entered a decree in conformity with it. After extensive post-trial proceedings, in the course of which the court filed a memorandum opinion adhering to its earlier ruling on the jurisdictional issue, the case was brought here by the filing of a timely notice of appeal.

II

In a diversity action such as this, federal courts must look to the law of the forum state to determine the district court's "in personam jurisdictional reach." *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 376 n. 2 (6th Cir. 1968.) *Cf. American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1167 (6th Cir. 1988). Plaintiff LAK chose neither Florida nor Indiana as its forum, of course, but opted instead for Michigan.

Michigan's long-arm statute authorizes the exercise of "general" personal jurisdiction over foreign partnerships on either of two grounds: consent, and "[t]he carrying on of a continuous and systematic part of [the partnership's] general business within the state." Mich.

Comp. Laws § 600.721. Neither of these grounds can be invoked in the case at bar; Deer Creek has not consented to be sued in Michigan, and there is no contention that a continuous and systematic part of Deer Creek's general business is carried on there.

A subsequent section of the long-arm statute, Mich. Comp. Laws § 600.725, deals with what Professors von Mehren and Trautman have labeled "specific jurisdiction," or jurisdiction limited to the adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate." Von Mehren & Trautman, *Jurisdiction to Adjudicate:* A *Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966). *Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984).

Mich. Comp. Laws § 600.725 provides that Michigan courts may exercise "limited" personal jurisdiction over foreign partnerships where the claim on which judgment is sought is one "arising out of" an act or acts creating any of five designated "relationships." Three of the named relationships (relationships involving in-state property, insurance, and contracts to perform services or furnish materials within the state) have no conceivable application in the present case. The two that might arguably apply are these:

> "(1) The transaction of any business within the state.
>
> (2) The doing or causing of any act to be done, or consequences to occur, in the state resulting in an action for tort."

Generally speaking, at least, "[t]he Michigan statute confers on the state courts the maximum scope of personal jurisdiction permitted by the due process clause of the Fourteenth Amendment." *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1236 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981). *Cf. Sifers v. Horen*, 385 Mich. 195, 188 N.W.2d 623 (1971) (Michigan legislature attempted to expand limited personal jurisdiction to the "full potential" allowed by the Federal Constitution.)[4]

The fountainhead of contemporary wisdom on what the United States Constitution permits in this respect is *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). That was an action brought by the State of Washington to collect unpaid contributions to an unemployment compensation fund from a non-resident corporation that had employed 11 to 13 commission salesmen within the state over a four-year period. The defendant corporation exercised direct supervision and control over the salesmen, who both lived and worked in Washington. The men engaged there in a regular and systematic solicitation of orders which, when filled, produced a continuous flow of the corporation's product into the state. The obligation sought to be enforced "arose out of those very activities," which were "systematic and continuous throughout the years in question." *Id.* at 320. Against this background, the Supreme Court decided that the defendant's actual presence within the territorial jurisdiction of

---

[4] Michigan may have stopped short of the constitutional limit, however, as far as actions for tort are concerned. *Rann v. McInnis*, 789 F.2d 374, 377 (6th Cir. 1986), citing *Woodward v. Keenan*, 88 Mich.App. 791, 279 N.W.2d 317 (1979).

the state was not a prerequisite to a Washington court's exercise of personal jurisdiction over it: the defendant had "certain minimum contacts with [the territory of the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316, quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

Whether "traditional notions of fair play and substantial justice" would be offended by a Michigan's court's exercising personal jurisdiction over defendant Deer Creek on the strength of the largely fortuitous "contacts" that Deer Creek had with the State of Michigan is, no doubt, a debatable question, Clearly, however, Deer Creek's contacts with Michigan bear little resemblance to the far more substantial contacts in which the International Show Company engaged, over a period of years, with the State of Washington.

The "traditional jurisprudential premise" was that "the plaintiff should seek out the defendant." Von Mehren & Trautman, *supra*, 79 Harv. L. Rev. at 1148. (Von Mehren and Trautman observe that the traditional bias favoring defendants in this respect "is doubtless fully appropriate as between parties of relatively equal economic power and legal sophistication." *Id.* at 1147.) Traditions can change, however, and by 1957 the Supreme Court was remarking on a clearly discernable trend – a trend that neither began nor ended with the *International Shoe* decision – "toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222 (1957).

Less than a year later, on the other hand, the Supreme Court warned that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on personal jurisdiction of state courts." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). That warning remains fully operative today. The Supreme Court has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes," not could it do so without betraying "the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). *Cf. Denckla*, 357 U.S. at 251 (restrictions on state court personal jurisdiction "are a consequence of territorial limitations on the power of the respective States.") It is still incumbent upon the plaintiff to establish the requisite minimum contacts, as a condition to requiring an absent party to defend itself on the plaintiff's turf, and those contacts must still be sufficient to satisfy "traditional notions of fair play and substantial justice."

Even when anchored to the "traditional," of course, notions of what constitutes "fair play and substantial justice" can exhibit a fair amount of diversity. Not surprisingly, perhaps, *International Shoe* has spawned a vast number of judicial opinions – many of which have been cited to us here – in which courts have attempted to give content to these generalized notions in a variety of concrete factual settings.

In the leading case of *Southern Machine Co. v. Mohasco Industries*, 401 F.2d 374, *supra*, – a case which, like this one, involved limited (or "specific") jurisdiction – Judge Celebrezze, drawing on almost a quarter century of post-*International Shoe* caselaw, identified three criteria

that must be met before such jurisdiction may be exercised:

> "First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *Id.* at 381.

We have invoked these criteria often in the years since *Mohasco Industries* was decided. See, most recently, *Third National Bank of Nashville v. WEDGE Group, Inc.*, ___ F.2d ___ (6th Cir. 1989). The district court sought to apply the *Mohasco Industries* criteria in analyzing the facts of the present case, and we shall do the same.

III

A

The first criterion – a showing that the defendant has "purposefully availed itself of the privilege of transacting business" in the forum state, thus invoking the benefits and protections of its laws – is "the *sine qua non* for *in personam* jurisdiction." *Mohasco Industries*, 401 F.2d at 381-82. That such a showing is "essential," see *Denckla*, 357 U.S. at 253, was re-emphasized by the Supreme Court in *Burger King*, 471 U.S. at 474-75, and in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 112 (1987). Even in a case where the cause of action arose in the plaintiff's home state, that state may not exercise *in*

personam jurisdiction if the defendant has not purposefuly [sic] entered into a connection with it "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

"This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475, quoting *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984) and *World-Wide Volkswagen*, 444 U.S. at 199. There is a difference between what *World-Wide Volkswagen* calls a mere "collateral relation to the forum State," 444 U.S. at 299, and the kind of substantial relationship with the forum state that invokes, by design, "the benefits and protections of its laws." *Denckla*, 357 U.S. at 253. An understanding of this difference is important to the proper application of the "purposeful availment" test.

The Supreme Court has emphasized, with respect to interstate contractual obligations, that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King*, 471 U.S. at 473. The defendant in the case at bar, it seems to us, did not "reach out" to Michigan for the purpose of creating "continuing relationships and obligations" with any citizen of that state.

Defendant Deer Creek, it will be recalled, did not advertise the Cypress parcel for sale in Michigan or

elsewhere.[5] Deer Creek had no "program" for seeking out prospective buyers in Michigan. *Cf. Rann v. McInnis*, 789 F.2d at 376. It was Beznos Realty, on the contrary, that reached out to Deer Creek in Florida – and it did so not for the purpose of creating any "continuing relationship" in Michigan, but for the purpose of making a cash purchase of a choice piece of real estate in Florida.

The purchase negotiations that began in Florida ripened into a binding contract only when defendant Deer Creek signed the final agreement back home in Indiana. (The place where the contractual obligation was incurred is a factor that courts often deem important, although it cannot normally be determinative. See, *e.g.*, *Denckla*, 357 U.S. at 251-52, and *Davis H. Elliott Co. v. Caribbean Utilities Co.*, 513 F.2d 1176, 1181 (6th Cir. 1975).) The fact that Beznos Realty may have found it convenient to conduct some of the negotiations at long distance from Michigan is not of controlling significance, in our view. The telephone calls and letters on which the plaintiff's claim of jurisdiction primarily depends strike us as precisely the sort of "random," "fortuitous" and "attenuated" contacts that the *Burger King* Court rejected as a basis for haling non-resident defendants into foreign jurisdictions.

A numerical count of the calls and letters has no talismanic significance: "The quality of the contacts as

---

[5] The district court thought it significant that "Defendant solicited purchasers nationally," but the record does not disclose any national solicitation. Deer Creek did receive a number of *unsolicited* inquiries and offers, and that circumstance may well have encouraged it to hold firm on its price.

demonstrating purposeful availment is the issue, not their number or their status as pre- or post-agreement communications." *Stuart v. Spademan*, 772 F.2d 1185, 1194 (5th Cir. 1985). And the majority of the lawyers' telephone calls between Detroit and Indianapolis, for whatever that datum may be worth, were originated not by the defendant's lawyer, Mr. Backer, but by Mr. Mehr, the lawyer for Beznos Realty.

"The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State." *Helicopteros Nacionales*, 466 U.S. at 417, quoting *Denckla*, 357 U.S. at 253.[6] We are not prepared to hold that when Mr. Mehr placed calls to Mr. Backer in Indiana, the latter was required to hang up the phone if he wished to protect his client against a subsequent finding of "purposeful availment" of the benefits of the laws of whatever state or states the calls happened to come from. Mere awareness that Beznos Realty and its legal counsel were from Michigan clearly was not enough. See *Asahi Metal Industry*, 480 U.S. at 105.

Mr. Backer did, to be sure, originate some calls to Mr. Mehr, and he did send three draft contracts to Mr. Mehr in Detroit. (Deer Creek's refusal to adjust the purchase price was also confirmed by letter to Mr. Mehr, but that has little or no significance in this context.) On the facts

---

[6] "The 'substantial connection' [citations omitted] between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*" *Asahi Metal Industry*, 480 U.S. at 112 (1987). (Emphasis in original.)

of this case, however, we do not find these communications sufficient to establish "purposeful availment." *Cf. Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309, 314 (8th Cir. 1982) (The use of interstate facilities such as the telephone and the mail is a "secondary or ancillary" factor and "cannot alone provide the 'minimum contacts' required by due process"). See also *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984) ("As for the exchange of communications [by telex, telephone and letter] between Texas and Alaska in the development of the contract, that in itself is also insufficient to be characterized as purposeful activity invoking the benefits and protections of the forum state's laws."). On the record before us, to borrow from this court's language in *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974), there is no reason to suppose that either Mr. Hasten, the general partner, or Mr. Backer, the lawyer, intended to lay himself open to liability "in every state of the union whenever [he made] telephone calls or wrote letters to a customer who [might subsequently claim] that they constitute[d] misrepresentations."

One of the Sixth Circuit decisions most pertinent to the present case on its facts is *Capital Dredge & Dock Corp. v. Midwest Dredging Co.*, 573 F.2d 377 (6th Cir. 1978). The plaintiff in *Midwest Dredging*, an Ohio corporation, brought an action in Ohio on a contract with a foreign company under which the plaintiff had "taken back" a subcontract for a dredging project in Illinois. The contract on which suit was filed had been the subject of face-to-face negotiations in Arkansas and Florida, but modifications were negotiated in telephone calls placed by the

plaintiff from Ohio, the forum state. The defendant mailed an amended contract to the plaintiff in Ohio, and a vice president of the defendant subsequently traveled to Ohio to obtain the plaintiff's signature on the contract and pick up a check there for $250,000 the initial payment under the agreement.

Although the final signature was placed on the contract in the forum state at a time when an officer of the defendant corporation was physically present in that state, this court, speaking through Judge Peck, accepted the district court's characterization of the defendant's visit as "a convenience" to the plaintiff. *Id.* at 380. We agreed with the district court that the facts were "simply insufficient to establish long-arm jurisdiction over defendant." *Id.* Almost *a fortiori*, it seems to us, the facts of the present case are insufficient to establish long-arm jurisdiction over defendant Deer Creek – a defendant that never sent its representatives into the forum state, and that did not consummate the contract there.

The *Midwest Dredging* panel took pains to distinguish the facts in that case from the facts in *Mohasco Industries* and *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972). The differences are no less instructive here.

The defendant in *Mohasco Industries* entered into a licensing agreement under which the plaintiff – which had its sole manufacturing plant in Tennessee, the forum state – was authorized to manufacture and sell machine attachments on which the defendant held patent rights. The agreement contemplated "a long continuing relationship" between the parties, and the defendant "retained

substantial control over the manufacture and marketing of the attachments . . . ." 401 F.2d at 385. The contract was "not a one-shot affair." *Id.* Because the manufacturing plant was located in Tennessee, that state had "a continuing interest in this continuing relationship, and apparently [the defendant] ha[d] a continuing interest in profiting from the Tennessee market." *Id.* at 385-386.

No such relationship was created by the real estate purchase agreement with which we are concerned in the case at bar, and defendant Deer Creek had no "continuing interest in profiting from the [Michigan] market." Plaintiff LAK makes a weak argument that Deer Creek might have been required to provide memberships in the recreational facilities it owned near the Cypress parcel, and the parties could anticipate a continuing relationship as neighbors in Florida. That is a circumstance of no interest to Michigan, however, and it is one that could not reasonably be expected to have any significant impact on the commerce of Michigan. (We note also that if Beznos Realty chose unilaterally to perform work in Michigan on site plans, architectural renderings, and financial studies for the Florida property, that was a happenstance in which defendant Deer Creek had no continuing interest and over which it had no control.)

The *Van Dusen Air* case, like *Mohasco Industries*, involved a contract that contemplated the manufacture of a substantial quantity of goods in the forum state. The defendant company did not do business there directly, but it had a subsidiary in the forum state, and the defendant's officer met with the plaintiff in the city where the subsidiary was located to discuss delivery plans and the operational features of the goods being contracted for. As

in *Mohasco*, this court found that the "purposeful action" requirement had been satisfied, in the context of a long-arm statute that spoke of "transacting any business" in the forum state, because "obligations created by the defendant or business operations set in motion by the defendant [had] a realistic impact on the commerce of that state," and the defendant "should have reasonably foreseen that the transaction would have consequences in that state." 466 F.2d at 226, quoting *Mohasco*, 401 F.2d at 382-83. That is not the situation here.

The commerce that was affected by the defendant's "purposeful action" in *Mohasco Industries* and *Van Dusen Air* involved, as we have noted, significant ongoing manufacturing operations within the forum state. (There is some similarity, it would seem, between these ongoing operations and the 20-year franchise relationship that was actively managed from the forum state in *Burger King*. See 471 U.S. at 480.) The case at bar involves no comparable operations in Michigan. Because the plaintiff was domiciled in Michigan, to be sure, the claimed injury to its purse might be said to have been suffered there – but the *locus* of such a monetary injury is immaterial as long as the obligation did not arise from "a privilege the defendant exercised in [the forum state]." *Denckla*, 357 U.S. at 252. With the benefit of hindsight, moreover, we know – because the jury so found – that the plaintiff in the case at bar suffered no damages as a result of the defendant's breach of duty.

This case is not comparable, we would add, to *Lanier v. American Board of Endodontics*, 843 F.2d 901 (6th Cir.), *cert. denied*, 109 S.Ct. 310, 102 L.Ed.2d 329 (1988). There, as we observed, the defendant licensing board sought

> "to extend its influence and prestige in Michigan as the principal national determiner of special competence for the practice of endodontics. Thus, the real object of the Board's contacts with Michigan is to have ongoing, far-reaching consequences in the Michigan dental services market. These consequences are continuous and substantial, affording jurisdiction . . . ." *Id.* at 911.

There has been no showing that the object of Deer Creek's contacts with Michigan was to have "ongoing," or "far-reaching," or "continuous," or "substantial" consequences in the Michigan real estate market, thereby affording jurisdiction to the Michigan courts.

B

The plaintiff having failed to pass the "purposeful availment" test, we need not dwell on the other criteria of *Mohasco Industries;* each criterion represents an independent requirement, and failure to meet any one of the three means that personal jurisdiction may not be invoked. Following the lead of the lower court and the parties, however, we shall touch on the second and third criteria briefly.

We are not persuaded that plaintiff LAK has shown that its cause of action "arose out of" the defendant's activities in Michigan. Essentially, of course, the cause of action arose out of a failure to obtain approval from local authorities in Florida for construction of additional housing untis [sic] there, after the defendant had warranted, in an Indiana contract negotiated in several different states, that such approval would be forthcoming. If the contract had borne a more substantial relationship to

Michigan, it would not have been necessary for the representations it embodied actually to have been made to the plaintiff in Michigan. See *WEDGE Group*, ___ F.2d ___. Where the defendant's contacts with the forum state are as attenuated as they are here, however, we think it is incumbent on the plaintiff to show affirmatively that the fraudulent misrepresentations were actually made in the forum state. See *Serras v. First Tennessee Bank N.A.*, 875 F.2d 1212 (6th Cir. 1989).

The plaintiffs in *Serras* were individual citizens of Michigan who had purchased an out-of-state restaurant on the strength of fraudulent misrepresentations as to its value. The documents consummating the sale were executed in Michigan. Not only had the defendant made its fraudulent misrepresentations in telephone calls initiated by it to the plaintiffs in Michigan, moreover, it had actually sent an agent into the state who continued the fraudulent conduct there in person. On these facts, the *Serras* panel found that there was no constitutional impediment to haling the foreign defendant before a court in Michigan. The panel went out of its way, however, to distinguish the sort of situation with which we are confronted in the case at bar:

> "We are not confronted here with a case in which the only alleged contact besides the plaintiffs' Michigan residency, is the defendant's making a telephone call from an out-of-state location to the plaintiffs in Michigan, seeking to solicit the plaintiff to engage in an out-of-state transaction. These facts are not sufficient to support long-arm jurisdiction. *Speckine v. Stanwick Int'l, Inc.*, 503 F.Supp. 1055, 1059 (W.D. Mich. 1980). *In the present case, the plaintiffs rely not only on alleged telephone calls but also on an allegation*

> *that the defendant actually travelled to Michigan to solicit their business, and actually made fraudulent representations while in Michigan.*" 875 F.2d at 1217. (Emphasis supplied.)

The *Serras* panel went on to point out, in a passage particularly relevant here, that:

> "The alleged fraudulent misrepresentations practiced upon plaintiffs within Michigan, both in the phone calls and during the visit of the Bank's agent, are an *element* of the cause of action itself. We therefore must reject the Bank's feeble argument that, if it had a duty to disclose anything, that duty could have been performed anywhere so that any failure to perform shouldn't be held to establish a Michigan contact. Plaintiffs have averred positive acts of misrepresentation in Michigan." *Id.* at 1218. (Emphasis in original.)

"The burden of establishing jurisdiction is on the plaintiff." *Welsh v. Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *WEDGE Group*, ___ F.2d at ___. For all we can tell from the record in the case at bar, Beznos Realty's people were in Florida when they were told that the city would approve construction of an additional 532 units on the Cypress parcel. It is true that during a telephone conversation with Attorney Backer in Indiana, Mr. Mehr, the Michigan Lawyer, proposed putting language to this effect in the contract. There was no showing that any misrepresentations were made in the course of this conversation, however – the district court confessed itself "without knowledge of the precise content of the conversation" – and as both Mr. Mehr and Mr. Beznos have acknowledged, the contract became binding only when it was signed in Indianapolis. On these facts,

we do not believe that the plaintiff has sustained its burden of showing that its cause of action arose out of "positive acts of misrepresentation in Michigan." *Serras*, 875 F.2d at 1218.

C

Finally, notwithstanding the perhaps unreasonable length this opinion has already reached,[7] we add a word about "reasonableness."

In *Pickens v. Hess*, 573 F.2d 380 (6th Cir. 1978), we affirmed a district court finding that it would not be reasonable for a Tennessee court to exercise jurisdiction in a dispute arising out of a contract for the construction of a house in Arkansas, notwithstanding that the plaintiff

---

[7] If it suggests nothing else, this case may suggest that there is a downside, as well as an upside, to the judicially imposed requirement that each and every question of personal jurisdiction over a non-resident defendant be decided "on its own facts," *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988), with counsel and court sifting through each new complex of facts in search of "contacts" demonstrating that the plaintiff's choice of a forum does or does not accord with the notions of "reasonableness" and "fair play" reflected in a vast number of fact-specific judicial opinions. More sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it – and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions that counsel choose to fight out in court. In this particular case, diligent lawyers have favored us with several hundred case citations: scholarship that comprehensive carries obvious costs both in time and in money.

builder was from Tennessee and notwithstanding that the defendant's architect was also from Tennessee and had dealt directly with the plaintiff builder in that state with regard to the contract. In the case at bar the district court attempted to distinguish *Pickens* on the following grounds:

> "Unlike the defendant in *Pickens*, the involvement of Deer Creek in this transaction is substantial enough to make it reasonable for this Court to assume jurisdiction over the parties. This forum has a vested interest in the outcome of this matter, particularly because Plaintiff and at least one Michigan banking institution are involved."

This attempt to distinguish *Pickens* is not persuasive, in our view. If Tennessee had no vested interest in the outcome of the Tennessee builder's dispute with a foreign owner over a contract for the construction of a house in Arkansas, we are something of a loss to see why Michigan should be thought to have a vested interest in the outcome of a Michigan company's dispute with a foreign owner over a contract for the sale of a tract of land in Florida. That a Michigan plaintiff happens to be involved in the transaction is hardly enough: "If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." *Burger King*, 471 U.S. at 478.

If the Michigan bank on which Beznos Realty drew its $275,000 check for the earnest money was somehow "involved" in this transaction, moreover, the involvement

is entitled to no consideration. See *Helicopteros Nacionales*, 466 U.S. at 416-17:

> "Common sense and everyday experience suggest that, absent unusual circumstances, the bank on which a check is drawn is generally of little consequence to the payee and is a matter left to the discretion of the drawer. Such unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." (Footnote and citations omitted.)

Plaintiff LAK suggests that it would be reasonable for the Michigan courts to exercise jurisdiction here because defendant Deer Creek was a "sophisticated business entity" that "stood to profit handsomely" from its transaction with the Michigan company. But the case law is quite clear that when the world beats a path to the door of one who has a better mousetrap for sale, the mousetrap seller, even if "sophisticated," does not automatically subject himself to suit in every part of the world from which mousetrap buyers chance to come. And when the buyer of the mousetrap is no less sophisticated than the seller, the buyer can hardly claim surprise at being told that jurisdiction over the seller's person is not dependent on the buyer's domicile.

The judgment of the district court is **REVERSED**, and the case is **REMANDED** with instructions that it be dismissed for want of personal jurisdiction.

No. 87-1321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAK, INC., A MICHIGAN CORPORATION, Plaintiff-Appellee, v. DEER CREEK ENTERPRISES, AND INDIANA GENERAL PARTNERSHIP, Defendant-Appellant	)	ORDER (Filed Nov. 2, 1989)

BEFORE: NELSON AND BOGGS, Circuit Judges; and EDWARDS, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-1321

LAK, INC.,

Plaintiff-Appellee,

v.

DEER CREEK ENTERPRISES,

Defendant-Appellant.

Before: NELSON and BOGGS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

JUDGMENT

(Filed Sep. 20, 1989)

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded with instructions that it be dismissed for want of personal jurisdiction.

IT IS FURTHER ORDERED that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER
OF THE COURT

Leonard Green, Clerk

/s/ Leonard Green
Clerk

Issued as Mandate: November 13, 1989 **A True Copy.**

COSTS: APPELLANT TO RECOVER **Attest:**

Filing fee	**$**	100.00
Printing	**$**	773.76
Total	$	873.76

/s/ Tom (illegible)
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAK, INC., a Michigan Corporation,

Plaintiff

v.

Civil Action No. 84-2370

DEER CREEK ENTERPRISES, an Indiana general partnership,

Defendant

_____/

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

(Filed Feb. 1, 1985)

At a session of the United States District Court for the Eastern District of Michigan in the United States Courthouse in Detroit, Michigan on _____

PRESIDING: _____
HONORABLE JULIAN ABELE COOK, JR.
United States District Judge

I

Plaintiff, Lak, Inc. [Lak], is a Michigan corporation that is principally engaged in the business of acquiring and developing real property. Defendant, Deer Creek Enterprises [Deer Creek], is an Indiana general partnership which is principally engaged in the business of real estate investment. Jurisdiction of this matter is based upon diversity of citizenship under 28 U.S.C. § 1332.

On March 2, 1984, Beznos Investment Company [Beznos], a Michigan co-partnership, and Deer Creek entered into a purchase agreement involving a real estate development ("Cypress Park") which consists of approximately forty-five acres of mostly developed land along the eastern coast of Florida. On May 8, 1984, Beznos assigned all of its rights under the purchase agreement to Lak.

On May 16, 1984, Lak, as Beznos' assignee, filed a Complaint for Declaratory Relief, pursuant to the Uniform Declaratory Judgment Act and *Fed.R.Civ.P.* 57, in which he sought to have this Court (1) compel Deer Creek to comply with the terms of the agreement, and (2) grant an appropriate abatement of the purchase price to compensate it for Deer Creek's failure to comply with the purchase agreement.

On June 11, 1984, Deer Creek filed a Motion to Dismiss, pursuant to *Fed.R.Civ.P.* 12(b)(2). Lak filed an answer to Deer Creek's Motion to Dismiss on June 29, 1984. Both pleadings were supplemented. Defendant's Motion is presently before the Court for resolution.

II

In its Motion to Dismiss, Deer Creek asserts that this Court lacks in personam jurisdiction. Initially, it argues that this Court's ability to assert in personam jurisdiction is subject to those limitations which have been established by the Michigan long arm statute (to wit, Michigan Compiled Laws Annotated [M.C.L.A.] § 600.725) and the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution. Deer Creek

asserts that the United States Constitution requires that a non-resident defendant must have sufficient contacts with the state in order to make jurisdiction reasonable according to the traditional notions of fair play and substantial justice, *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

In this regard, Deer Creek has set forth the tripartite test which has been developed in accordance with the *International Shoe* standards. First, the defendant must purposefully avail himself of the privilege of acting, or causing a consequence, in the forum state. Second, the cause of action must arise from the defendant's activities in the forum state. Finally, the acts of the defendant or the consequences which have been caused by the defendant must have a substantial connection with the forum state to make the exercise of jurisdiction over the defendant reasonable, *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968), and *Capital Dredge and Dock Corp. v. Midwest Dredging Co.*, 573 F.2d 377, 379 (6th Cir. 1978).

Deer Creek contends that the minimum contacts standards which have been set forth in the tripartite test cannot be met in this case. Thus, as in the following cases, Deer Creek contends that this Court should conclude that the standards have not been met. *Capital Dredge and Dock Corp. v. Midwest Dredging Co., supra; Pickens v. Hess*, 573 F.2d 380 (6th Cir. 1978); *Herman Miller, Inc. v. Mr. Rents, Inc.*, 545 F. Supp. 1241 (W.D. Mich. 1982); *Nelligan v. Johns-Mansville Sales Corp.*, 530 F. Supp. 654 (E.D. Mich. 1982).

Deer Creek also submits that this Court lacks a sufficient factual basis upon which to assert in personam

jurisdiction. It posits that the only act in Michigan occurred on February 29, 1984 when Lak signed the contract. However, Deer Creek contends that the contract did not become effective until March 2, 1984 when it signed the contract in Indiana. It asserts that this one act on February 29, 1984 is not sufficient to establish jurisdiction, *Pickens v. Hess*, 573 F.2d 380 (6th Cir. 1978). Deer Creek argues that in order for jurisdiction to be premised on a single transaction, Lak must demonstrate a "substantial connection" with the forum state, *Speckine v. Stanwick Intern., Inc.*, 503 F. Supp. 1055 (W.D. Mich. 1980).

In addition, Deer Creek contends that the exchange of mail and telephone correspondence between the principals is not enough to justify an assertion of in personam jurisdiction by this court (i.e., doing business in Michigan). It argues that the telephone conversations between the parties' agents were discussions involving Beznos' attempt to obtain the necessary financing with which to consummate a transaction that was unrelated to the business – and not for the purpose of negotiating the purchase agreement at issue in this case.

In an affidavit, Stephen A. Backer, an attorney for Deer Creek, submits that his telephone conversations with Michael Mehr, Lak's attorney, were conducted so that a decision could be made about the appropriate language to be used in the purchase agreement which, in turn, would enable them to discuss other incidental terms relating to title and survey requirements, soil testing, and the closing agenda. Deer Creek asserts that if the use of the telephone and the mail constitute "doing business" then "plaintiff could extend its argument to attempt to obtain personal jurisdiction over defendant in Arizona,

California, New Jersey, and perhaps in every state [where the parties] had telephone conversations."

Finally, Deer Creek maintains that its knowledge of Lak's residency in Michigan is an insufficient basis upon which to assert in personam jurisdiction. Deer Creek contends that the law requires more, *Speckine v. Stanwick Intern., Inc., supra,* and *Doebler v. Stadium Productions, Ltd.,* 91 F.R.D. 211 (1981).

III

Lak has filed three briefs in opposition to the pending Motion to Dismiss, in which it argues that Deer Creek has established sufficient contacts with this forum to support its argument (to wit, this Court has personal jurisdiction over Deer Creek).

First, Lak argues that this Court has jurisdiction under M.C.L.A. § 600.725(1). In this regard, Lak says that this statute authorizes a court to assume jurisdiction if a party has transacted "any" business within the state – a term that should be read broadly. It contends that Deer Creek's absence from the state is not relevant to a determination that business was transacted in Michigan, *Sifers v. Horen,* 385 Mich. 195, 198 (1971); *McGraw v. Matthaei,* 340 F. Supp. 162 (E.D. Mich. 1972).

In addition, although Lak recognizes the due process limitations which have been placed upon the long arm statute by virtue of the Fourteenth Amendment, it argues that the tripartite test has been met, *Southern Machine Co. v. Mohasco Industries, supra,* in that Deer Creek purposefully sought benefits by negotiating a commerical

[sic] transaction with a Michigan entity. Thus, in addition to "actively" negotiating the purchase agreement by telephone and through the mail, Lak maintains that (1) Deer Creek delivered a draft of the purchase agreement to Michigan, and (2) after the execution of the purchase agreement, Deer Creek continued to deliver documents to Michigan and to negotiate over the telephone. Lak contends that these contacts constitute sufficient bases upon which this Court can assert jurisdiction, *Chrysler Corp. v. Traveleze*, 527 F. Supp. 246 (E.D. Mich. 1981); *K-Mart Corp. v. Knitjoy Manufacturing, Inc.*, 534 F. Supp. 153 (D.C. Mich. 1981); *In-Flight Devices Corp. v. VanDusen Air, Inc.*, 466 F.2d 220, 234-235 (6th Cir. 1972); *Microelctronix Systems Corp. v. Bamberger's*, 434 F. Supp. 168, 170 (E.D. Mich. 1977); *Mad Hatter, Inc. v. Mad Hatters Night Club Company*, 399 F. Supp. 889, 892 (E.D. Mich. 1975); *McGraw v. Matthaei, supra*. Lak asserts that these cases support the recognized proposition that jurisdiction is not based on an incidental contact with the state, but rather upon a series or stream of continuous contacts which constitute a purposeful availment.

Lak submits that the second part of the test has been satisfied because this cause of action arises from Deer Creek's actions in Michigan. To support this position, it argues that the contract being sued upon was negotiated and drafted through correspondence and telephone calls to and from Michigan. Moreover, Lak contends that Deer Creek was, at all times, aware that it was dealing with a Michigan entity. To conclude its argument that the *Southern Machine* test has been met in this case, Lak argues that Deer Creek was a willing party who sought to deal with a Michigan entity in an attempt to profit handsomely from

a multimillion dollar real estate transaction and, as such, it is only reasonable that this Court should now resolve a dispute which arose from those transactions.

With the recognition that Deer Creek places great weight on the argument that the telephone conversations and the exchange of correspondence do not establish the necessary minimum contacts, Lak contends that its argument is predicated on (1) the quantity of Deer Creek's contacts, (2) the nature and quality of the contacts, and (3) the source and connection of the cause of action with the forum, *Khalaf v. Bankers and Shippers Insurance Company*, 404 Mich. 134 (1978).

In response to Deer Creek's argument that the contacts were "insignificant or related to a localized project that does not affect Michigan," Lak asserts that this argument does not comport with commercial reality. To support this position, it argues that the procurement of the money was a "material provision of the Purchase Agreement," in that the Deer Creek project required thirty million dollars in financing. Moreover, Lak contends that a project of this magnitude required an involvement in the national financial markets, and Deer Creek's assistance in the procurement of financing in the form of numerous conversations with the forum state is significant and sufficient to support its claim that personal jurisdiction is proper. In this regard, Lak contends that even though Deer Creek's contacts with the forum state may have taken place through an intermediary, this should not inhibit the Court from asserting personal jurisdiction over Deer Creek, *Parish v. Mertes*, 84 Mich. App. 336, 341 (1982); *Davis H. Elliott v. Carribbean Utilities Co., Ltd.*, 513 F.2d 1176 (6th Cir. 1975); see also *Duris v.*

Erato Shipping, Inc., 684 F.2d 352 (6th Cir. 1982); *First Nat'l Bank v. J. W. Brewer Tire Co.*, 680 F.2d 1123 (6th Cir. 1982); *Herzberg & Noveck v. Spoon*, 681 F.2d 474 (6th Cir. 1982); *National Can Corp. v. K Beverage Co.*, 674 F.2d 1134 (6th Cir. 1982); *Noel v. S.S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982).

IV

In this diversity matter, the Court must look to Michigan law to determine the existence of its in personam jurisdiction, if any, over Deer Creek. In Michigan, the applicable law is set forth in M.C.L.A. § 600.725 which provides, in pertinent part, as follows:

> Sec. 725. The existence of any of the following relationships between a partnership or limited partnership or an agent thereof and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such partnership or limited partnership and to enable such courts to render personal judgments against such partnership or limited partnership arising out of the act or acts which create any of the following relationships:
>
> (1) The transaction of any business within the state.

The Michigan Supreme Court has followed other state courts which have held that "limited personal jurisdiction over defendants, based on 'the transaction of any business within the state,' [should] generally [be] construed . . . as extending the state's jurisdiction to the farthest limits permitted by due process," *Sifers v. Horen, supra.*

Despite the broad reach of the Michigan long arm statute, the Court will review this case with the recognition that the constitutional limits upon jurisdiction over non-residents must control.

Thus, this Court must determine (1) if Deer Creek established minimum contacts with the State of Michigan, and (2) whether out of state service would comport with, and not offend, the traditional notions of fair play and substantial justice; *International Shoe, supra.*

In addition, Lak bears the burden of establishing jurisdiction. More specifically, it must "demonstrate facts which support a finding of jurisdiction," *Welsh v. Gibbs,* 631 F.2d 436, 438 (6th Cir. 1980), *cert. denied,* 450 U.S. 981, 101 S.Ct. 1517, 67 L.Ed.2d 816 (1981).

In *Southern Machine Co. v. Mohasco Industries, Inc., supra,* the Sixth Circuit, following the constitutional pronouncements of the Supreme Court in *International Shoe* and its progeny, formulated the three requirements which must be met in order to comport with due process standards.

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

With regard to the first and second *Southern Machine* requirements, this Court must determine whether the

facts warrant a finding that minimum contacts exist. Specifically, the Court must determine whether the negotiations that took place between the parties' agents were sufficiently substantial to constitute a purposeful availment.

Although the initial negotiations took place in Florida, Lak contends that the final negotiations and all redrafts of the purchase agreement were conducted by telephone and through correspondence. The affidavits from Albert S. Beke, Harold Beznos, and Michael J. Mehr ostensibly support this assertion. In addition, $275,000 from a Michigan bank was used in connection with the instant transaction.

Deer Creek says that Lak has mischaracterized the telephone conversations. It has provided the Court with affidavits from Stephen A. Backer [Backer] and Mark Hasten [Hasten] which, inter alia, maintain that these conversations were substantively unrelated to the negotiations.

This Court does not agree with Deer Creek's characterization of the conversations. Deer Creek says that Hasten was its only agent who negotiated "substantive terms of the Purchase Agreement." However, it seems as though Backer (another agent of Deer Creek) also conducted negotiations regarding certain provisions of the purchase agreement:

> The telephone conversations between Stephen A. Backer and Michael Mehr were merely to agree upon the final formal language of the purchase agreement and to include all of the incidental necessary terms of sale relating to soil

> testing, title and survey requirements and the closing agenda.
>
> Defendant's Reply Brief at 5.

In effect, Deer Creek contends that the telephonic communication between its agents and those representing Lak was informal and insufficient to constitute a transaction of business within the forum.

Admittedly, "[t]he nature and quality of a [partnership's] contact with a state that will serve as the basis for the exercise of in personam jurisdiction over that [partnership] by the State is not a subject of easy description." *Southern Machine Co. v. Mohasco, supra.*

While some terms of a contract are more significant than others, this Court is of the opinion that all of the terms of a contract are negotiable. Thus, even though Deer Creek does not believe that the content of the discussion between Backer and Mehr was "substantive," the contract terms, which were negotiated by Backer, are important for the purposes of determining whether this Court has in personam jurisdiction. Therefore, even without knowledge of the precise content of the conversation that took place between the parties, this Court concludes that Deer Creek purposefully availed itself of the privilege of transacting business in Michigan.

In *Southern Machine Co. v. Mohasco Industries, supra,* a case in which involved a controversy over a licensing agreement, the Court determined that "the negotiations were primarily [conducted] by long distance telephone between Tennessee and New York," the corporate homes of the two parties involved in the suit. In addressing this first question, the Court stated:

> In considering this question, we can first dispose of those matters that are immaterial. For example, Mohasco has denied that any of its agents have been physically present in Tennessee concerning any matter related to the licensing agreement. Physical presence of an agent is not necessary, however, for the transaction of business in a state. The solicting [sic] of insurance by mail, the transmission of radio broadcasts into a state, and the sending of magazines and newspapers into a state to be sold there by independent contractors are all accomplished without the physical presence of an agent; yet all have been held to constitute the transaction of business in a state. Similarly, the contention that Southern Machine solicited the agreement from Mohasco is immaterial. *Shealy v. Challenger Manufacturing Company*, 304 F.2d 102 (4th Cir. 1962). Mohasco chose to deal with Southern Machine; and as Judge Sobeloff noted in *Shealy*, it cannot diminish the puposefulness [sic] of Mohasco's choice that ". . . [Mohasco,] like the maker of the better mousetrap, is fortunate enough to get the business without active solicitation. . . ." 304 F.2d at 104.

In the instant cause, Deer Creek did not have any agents who were physically present in Michigan. In addition, although it did not solicit the business from Lak, this does not diminish the "purposefulness of [Deer Creek's] choice."

Moreover, this Court believes that Deer Creek's involvement with the drafting of the Purchase Agreement constitutes a sufficient nexus between Deer Creek and the cause of action to satisfy the second part of the test. The communication or negotiations that took place between Lak and Deer Creek concerned the purchase agreement and its terms and amendments. Thus, this cause of action

arose from Deer Creek's activities in Michigan. Accordingly, the first two parts of the *Southern Machine* test have been established.

The third part of the test requires that Deer Creek's acts or the consequences which have been caused by it have a substantial enough connection with the forum to make the exercise of jurisdiction reasonable. Deer Creek relies upon *Pickens v. Hess, supra,* which involved the construction of a residence in Arkansas. The *Pickens* Court, in holding that the District Court in Tennessee did not have in personam jurisdiction over defendants, stated that "[n]o continuing business relationship was established with the Tennessee plaintiff and the defendants had no reason to believe that their contract with [plaintiff] would have substantial consequences within Tennessee," 573 F.2d at 386. In that case, it was determined that all negotiations took place in Arkansas, outside of the forum state.

Unlike the defendant in *Pickens,* the involvement of Deer Creek in this transaction is substantial enough to make it reasonable for this Court to assume jurisdiction over the parties. This forum has a vested interest in the outcome of this matter, particularly because Plaintiff and at least one Michigan banking institution are involved.

For these reasons, Deer Creek's Motion for Summary Judgment is denied.

SO ORDERED.

/s/ Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
United States District Judge

Dated: _____
Detroit, Michig

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAK, INC., a Michigan corporation,

Plaintiff

v.

DEER CREEK ENTERPRISES, an Indiana general partnership,

Defendant

_____/

Civil Action No. 84-CV-72370-DT

HON. JULIAN ABELE COOK, JR.

MEMORANDUM OPINION AND ORDER

On November 12, 1986, Defendant filed a Motion for Judgment Notwithstanding Verdict, New Trial, or Amendment of Judgment or Stay of Execution. The motion (1) seeks to overturn a jury verdict on certain issues, and (2) requests a withdrawal or an amendment of a judgment[1] which granted a remedy of specific performance to Plaintiff. The jury found that Defendant (1) materially breached its obligations under a contract for the sale of land in Florida, and (2) had committed fraud in connection with the transaction. Although the jury did not award damages, it did recommend that the Court

[1] The judgment was entered by this Court on October 31, 1986.

grant specific performance to Plaintiff.[2] This Court subsequently adopted this recommendation.[3]

I

Defendant asserts that the jury verdict is invalid because this Court did not have personal jurisdiction over it. However, this Court has already issued a thirteen page Opinion, which specifically rejected the same argument that Defendant now makes with regard to the jurisdiction of the Court in the instant motion.[4] This Court does not find any reason to modify the rationale and/or the conclusion of that Opinion. However, the Court will address those new authorities which have been relied upon by Defendant.

Defendant states that the Supreme Court decision in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) and a recent decision by the Eleventh Circuit in *Borg-Warner Acceptance Corporation v. Lovett & Thorpe, Inc.*, 786 F.2d 1055 (11th Cir. 1986) require a different result. Defendant also contends the instant cause is very much like *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1966).

In *Burger King*, the Court held that *in personam* jurisdiction existed in Florida against a Michigan resident

---

[2] The recommendation of the jury was rendered in the form of an "Advisory Verdict."

[3] The recommendation of the jury was subsequently incorporated into the judgment which was entered by this Court on October 31, 1986.

[4] *See* Memorandum Opinion and Order Denying Defendant's Motion to Dismiss which was filed on January 31, 1985.

who entered into a franchise agreement with a Florida resident. The Court found that its decision did not violate the tenets of due process. Thus, *Burger King* stands for the proposition that Rudzewicz, a Michigan resident, had reached out beyond his home state to "create continuing relationships and obligations with residents of another state."[5] In this case, Defendant argues that such continuing obligations did not exist here because it only negotiated with the Michigan office of Harold Beznos, the principal stockholder in Plaintiff, by telephone. Moreover, Defendant asserts that the earnest money, which came from a Michigan bank, is not enough of a contact in this State to establish jurisdiction with this Court.

Defendant's argument, however, trivializes the actual contacts between the parties. For example, extensive negotiations and redrafting of the purchase agreement occurred between Plaintiff's lawyer in Michigan and representatives for Defendant.[6] Although *Burger King* makes it clear that the existence of a contract alone may not be enough, the extended negotiations between the principals show an "actual course of dealing" which continued even after the agreement was adopted. *Burger King* finds the extent of actual course of dealing and the future contacts to be crucial. *Burger King*, 471 U.S. at 479. These negotiations occurred over the telephone and in correspondence between Michigan and Florida.

The absence of any physical trips by Defendant or its representatives to Michigan is unimportant. Id. at 476. In

---

[5] *See* Defendant's brief at 11.

[6] *See LAK, Inc. v. Deer Creek Enterprises*, No. 84-CV-72370, Memorandum Opinion and Order Denying Defendant's Motion to Dismiss at 10-11 (E.D. Mich. Jan. 31, 1985).

reaching out to Florida, Rudzewicz established substantial connections with that state. *Id.* at 479. Rudzewicz knew that he was dealing with a Florida corporation. *Id.* at 480. Thus, the Supreme Court concluded that it was fair to hold Rudzewicz reachable by Florida jurisdiction. Here, Defendant reached out to Michigan. Defendant also knew that he was dealing with Michigan residents. It is likewise appropriate to conclude that this Court has jurisdiction. Several other factors are noteworthy; namely (1) the agreement was signed by Beznos in Michigan on February 28, 1984, (2) a Michigan bank put up over $200,000 in financing, and (3) Defendant solicited purchasers nationally. Therefore, utilizing all of these factors, and for the same reasons which were articulated by *Burger King*, this Court believes that it is fair to hold Defendant in the instant cause reachable in Michigan.

Finally, it is worth noting there is a much greater connection between Defendant and Michigan in the instant cause than in those older cases which were cited in *Burger King* where the Court viewed the contacts as too fortuitous to satisfy due process. In one of those cases, the Court ruled that due process did not permit a state to exercise jurisdiction over an out-of-state automobile distributor whose only tie to the state was a customer's decision to drive there. Nor was due process satisfied in a suit against a divorced husband for child support payments when his only connection with the forum state was the wife's decision to settle there. *Id.* at 475 n.17. In contrast to these random contacts, Defendant in this cause chose to execute a multi-million dollar contract with residents of Michigan after having had continuous dealings and negotiations with them.

This case is also distinguishable from *Borg-Warner* and *Helicopteros*. *Borg* held that a mere one-time purchaser of goods from a seller in the forum state cannot be subjected to personal jurisdiction. *Borg* is distinguishable from this case because the contract at issue in that cause was negotiated in Georgia with no connection to Missouri, the forum state. Here, the continual negotiations were done by correspondence and on the telephone between the parties in Florida and the parties in Michigan. The continual negotiations here sharply contrast with the one trip into Missouri which had been made by defendant to return goods in *Borg*. In addition, the purchaser in this cause signed the contract in the forum state where he lived. Moreover, the Court in *Borg* noted that "(t)here is no evidence that Lovett & Thorpe . . . solicited business in Missouri . . . " *Borg*, 786 F.2d at 1057. By contrast, Defendant in this case solicited nationally for purchasers and accepted offers from people within the State of Michigan.

Helicopteros is also not relevant when one examines Justice Blackmun's opinion:

> We hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a state's assertion of *in personam* jurisdiction over a nonresident corporation *in a cause of action not related to those purchase transactions.*

466 U.S. at 418 (emphasis added). Here, in contrast, Plaintiff's causes of action (breach of contrast and fraud) are directly related to the purchase transaction which provides the basis for the jurisdiction of this Court. Thus, for all of the above reasons, and the analysis in the earlier

Memorandum Opinion on the subject, this Court finds that personal jurisdiction over the parties does exist.

II

In deciding whether to grant or deny a judgment notwithstanding the verdict, the Sixth Circuit Court of Appeals has stated:

> [T]he evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor.

Morelock v. N.C.R. Corp., 586 F.2d 1096, 1104 (6th Cir. 1987). Such a motion should only be granted where the evidence is so strongly against the verdict that "reasonable minds could not come to a different conclusion." *Id.* at 1105. Defendant clearly does not meet this stringent burden of proof here.

First, it has been alleged that Plaintiff "abandoned" its allegation that Defendant "unequivocally repudiated" its obligations under Paragraph 8 of the contract. In support of that proposition, Defendant appears to argue that it simply followed its own interpretation of the contract and, thus, "(i)t cannot be anticipatory repudiation to insist on one of two permissible constructions of an ambiguous contract."[7]

---

[7] *See* Defendant's brief at 15.

Paragraph 8(g) of the contract states:

> That the property is currently zoned to permit the construction of 532 units, and 532 units shall be available to the property in accordance with an appropriate site plan, as long as purchaser complies with all appropriate laws and regulations governing the development of the property.

Defendant argued at trial that the contract did not give Plaintiff the right to have a site plan approved in advance of closing. Yet, Defendant's argument (to wit, that it purportedly could not have anticipatorily breached an ambiguous contract) does not mean that Plaintiff had "abandoned" its claim of anticipatory repudiation. Plaintiff has continually maintained throughout these proceedings that its Exhibit 7 was evidence of an unequivocal repudiation by Defendant.[8] Plaintiff also argued that it did not get the 532 units which had been promised by Defendant. Jury Instruction 32 explains, *inter alia*, how the anticipatory repudiation claims relate to Plaintiff's overall breach of contract claim.[9] The evidence and

---

[8] Exhibit 7 is a letter from Stephen Backer to Michael Mehr, dated May 1, 1984.

[9] Jury Instruction 32 reads:

> The refusal by one party to perform a material term of a legal contract amounts to its breach and will give a right of action for its enforcement, without waiting for the time of performance. When one party to a contract has refused to take further steps in its execution, the other need not wait for him to do so, especially if the subject matter of it is being damaged in consequence of the delay.

(Continued on following page)

instructions indicate that Plaintiff did not abandon the anticipatory repudiation claim and certainly produced enough evidence to survive a judgment notwithstanding the verdict on this point.

Second, Defendant alleges Plaintiff never demonstrated that it could not have obtained permission to construct the 532 units. Yet, this assertion does not form the basis for a judgment notwithstanding the verdict. The key issue was not whether an increase in units could be obtained – but who was obliged to obtain it and when. Thus, this argument is without merit since the jury found that Defendant breached its obligations under the contract. The ambiguity of Paragraph 8(g) certainly indicates that the jury could have reasonably interpreted it in favor of Plaintiff. Clearly, a judgment notwithstanding the verdict is inappropriate.

III

Defendant's central argument is that the Court erred in granting specific performance without balancing the equities. Defendant contends that specific performance should not be granted when it gives Plaintiff the supposedly unconscionable windfall of a forty percent appreciation in the value of the land that amounts to two million dollars.

(Continued from previous page)

Upon the anticipatory breach of a contract, the right of action accrues and the party is not compelled to wait until their actual accural [sic] before suing.

There are several flaws in this argument. First, the Court did balance the equities in the "Memorandum Opinion and Order," to which reference has been made earlier. The Court stated, "Moreover, no remedy at law could be as efficient at bringing about justice for the Plaintiff as specific performance." Opinion at 2. Second, the equities clearly weighed in Plaintiff's favor. The jury found that Defendant breached a contract which would have given this land to Plaintiff two years ago. It is, therefore, disingenuous for Defendant to say that Plaintiff is unfairly getting a forty percent appreciation in land value when it is Defendant whom the jury found to have caused the two year delay in the consumation [sic] of the transaction. Specific performance is simply granting the land to Plaintiff that it was entitled to acquire two years ago.

Third, Defendant has not contradicted the testimony of Beznos who assserted that the construction costs have increased by fourteen percent per year (Beznos, Vol. II, p. 218). These additional costs would add approximately 14.2 million per year to the development bill. This increase in costs far exceeds any appreciation in property value. The balance of equities strongly favors Plaintiff.

IV

Motions for a new trial are permitted by *Fed. R. Civ. P.* 59. However, *Fed. R. Civ. P.* 61 provides that no error "is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice." One commentator has summarized this harmless error rule by

saying that "[i]t is only those errors that have caused substantial harm to the losing party that justify a new trial." Wright & Miller, 11 *Federal Practice and procedure*, § 2805 at 41 (1973). Thus, Defendant bears a heavy burden when seeking a new trial. It must show that (1) this Court erred, and (2) the error caused substantial harm. Defendant cannot show, and has not shown, either point.

Defendant alleges that this Court erred by failing to give the jury an instruction regarding that section of Paragraph 8(g) which states that:

> 532 units shall be available to the property in accordance with an appropriate site plan, *as long as Purchaser complies with all appropriate laws and regulations governing the development of the property.*

(Emphasis added). Defendant contends that the failure of this Court to instruct the jury about a purchaser's obligation to comply with all appropriate laws and regulations governing the development of property was extremely prejudicial. In Defendant's view, it was prejudicial because the jury could have ignored the language and, thus, found Defendant to have breached its obligations without ever determining if Plaintiff breached it obligations. According to Defendant, the prejudice would accrue because it is exonerated from any breach under the provisions of Paragraph 8(g) if Plaintiff does not comply with the applicable regulations. Moreover, Defendant says that the jury was never allowed to make this determination about Plaintiff.

As support for its interpretation that Paragraph 8(g) conditions a finding of a violation by Defendant upon a determination that Plaintiff complied with all of the

applicable rules, Defendant relies upon a statement by the Court during a December 10, 1985 hearing on the parties' respective motions for summary judgment. At that hearing, the Court held that the contractual wording (to wit, "as long as purchaser complies with all appropriate laws and regulations governing the development of the property") was language of condition.

Defendant further argues that its proposed Instructions 3 through 6 should have been given because (1) they embodied this Court's construction of this part of Paragraph 8(g), and (2) the Court is obliged to construe the contract for the benefit of the jury. This Court could not, and would not, have given Defendant's proposed Jury Instructions 4-6 because they contained numerous errors.

Defendant's Jury Instruction 4 would have required this Court to tell the jury "Plaintiff . . . was required to apply to and secure approval . . . to allow the increase in density." This instruction would have contradicted Instruction 33 which stated that the contract was ambiguous on this issue. The point of Instruction 33 was to leave the matter for the jury to resolve. Defendant's interpretation would have already resolved this issue. The jury apparently decided that Defendant's interpretation of the contract was incorrect. Jury Instruction 4 clearly would have been wrong.

Jury Instruction 5, as proposed by Defendant, stated that "plaintiff's failure to comply with laws and regulations is . . . [only] excused if . . . Deer Creek somehow prevented or hindered plaintiff. . . ." This instruction is flawed because it sets forth an unequivocal statement (i.e., "plaintiff's failure to comply") which is, at best, a

factual question which the jury was required to resolve.[10] Moreover, Defendant never established that Plaintiff failed to comply. Defendant's Proposed Jury Instruction 6 simply gave a definition of a material breach. Jury Instruction 31[11] already did that.

Defendant's [sic] also argues that the Court should have given the Proposed Jury Instruction 3, ¶ 5, which says:

---

[10] At the hearing on the motions for summary judgment, this Court never said that Plaintiff failed to comply. It simply ruled preliminarily that "it *appears* that the purchaser did not comply. . . ." (emphasis added). Thus, this was not a matter that the Court had already determined. Instead, the Court took a preliminary position, as it was obligated to do, for the purposes of summary judgment. Any final determination was left for the jury.

[11] Jury Instruction 31 reads:

> A material breach (or a violation) of a contract occurs when one party breaks its obligations to the other party by, among other things:
>
> (1) the repudiation of its liabilities under the contract, or
>
> (2) the failure or refusal to perform a substantial portion of its obligations to the other party.
>
> *Material* means relevant or pertinent. A *material breach* occurs whenever one party's failure or refusal to perform defeats the purpose of the contract in whole or in some vital aspect. However blameless the failure or refusal to perform may be, if the result of the breach is to deprive the other party of an essential part of the contract, then a material breach has occurred.

> The provision of paragraph 8(g) which required Deer Creek to secure an increase in the available density from 508 units to 532 was conditioned upon Plaintiff's compliance with all appropriate laws and regulations governing development of the property. Therefore, I instruct you that Deer Creek was not obligated to secure the increase in density if you find that Plaintiff did not comply with all such regulations, unless you find their failure to comply was excused.

Defendant asserts that the omission of this instruction is severely prejudicial and, thus, merits a new trial.

A fundamental problem with Defendant's position is that the omission is not an error at all because the inclusion of Defendant's proposed jury instruction would have been cumulative. In fact, paragraph 2 and 3 of Jury Instruction 30 take care of this issue, as do other parts of the instructions.

Instruction 30, paragraph 2, states that:

> In order to prevail on its breach of contract claim, [Plaintiff] must satisfy each of the following elements by a preponderance of the evidence:
>
> (2) that [Defendant] had a duty to perform certain specific obligations under the contract (to wit, convey at closing a parcel of property known as Cypress Park upon which 532 new units could be built).

The absence of any need for the proposed Jury Instruction 3 is evident because the jury could not have found under Jury Instruction 30 that Defendant had a "duty to perform," if it felt that Plaintiff had not complied with all of the applicable regulations, as required by the end of Paragraph 8(g). The jury was fully aware of Paragraph

8(g) because it was quoted in Jury Instruction 5. Clearly, the jury was fully informed about Paragraph 8(g) before deciding whether Defendant did, or did not, have a duty to perform.

In addition, Paragraph 3 of Jury Instruction 30 says that Plaintiff must show "(3) that [Defendant] materially breached its contractual obligations to [Plaintiff] under the contract . . . " Jury Instruction 31 defined a breach as "(2) the failure or refusal to perform a substantial portion of [a party's] obligation to the other party." In deciding whether the contractual obligations were breached by Defendant, the jury could not have avoided an examination of Paragraph 8(g) before resolving the issues in controversy. Jury Instruction 33 also advised the jury to focus on Paragraph 8(g). Page 21 of the instructions also explicitly advised the jury of Defendant's theory of the case, saying "[a]ccordingly, the seller maintains that the purchaser breached the agreement by failing to follow the procedures of the city and county." Thus, Defendant's proposed instruction was not needed.

Defendant repeatedly argued that Plaintiff breached its contractual obligations by failing to comply with the municipal ordinances which permit a plat amendment. The jury was fully aware of Defendant's position on this issue. The verdict represented an absolute rejection of Defendant's argument. Moreover, it should be noted that Defendant did not, and has not, identified any other regulation that Plaintiff could have violated. Thus, Defendant is incorrect in arguing that this Court was obliged to give its proposed instruction 3(5). Such an instruction was unnecessary because the issue of Plaintiff's purported breach had been already covered elsewhere.

Even if this Court did err in failing to give this instruction, the error was certainly harmless. The proposed instruction would have expressly required the jury to determine whether Plaintiff breached the contract. The omission was harmless at best because the jury had to resolve that issue anyway for the reasons which have been discussed above. The omission was also harmless because Defendant failed to establish that Plaintiff breached the agreement. Even the proposed instruction says that Plaintiff's alleged breach could be excused by the actions of Defendant. The evidence of Defendant's anticipatory repudiation suggests the presence of such an excuse.

The other jury instruction issue, upon which Defendant seeks a new trial, involves anticipatory repudiation. Defendant asserts that *Mori v. Matsuhita*, 380 So.2d 461 (Fla. App. 3d Dist. 1980) means that only unequivocal absolute repudiations constitute repudiations. According to Defendant, this Court's Jury Instruction 33 precludes a jury finding of repudiation because it says that the contract is ambiguous. Defendant points out that it could not have unequivocally repudiated the contract if its actions were consistent with one of two permissible contract constructions.

This Court's statement (to wit, that the contract is ambiguous) is essentially used by Defendant to argue that the contract in unenforceable. However, this Court's statement should not have been interpreted to mean that the contract was so ambiguous that it was unenforceable. A jury was unanimously able to determine what the contract meant after reviewing the testimony and the evidence regarding the contract. The statement by the

Court was not based on this detailed factual examination. Such an examination of questions regarding intent is clearly the province of the jury. Defendant is bound by the jury's conclusion. Defendant's own confusion about the contract cannot be used to avoid specific performance when a jury unanimously finds Plaintiff's view to be correct. Contracts would be rendered useless in this scheme.

Mori is also not apposite because it does not speak about ambiguities in the language of the contract. The focus of *Mori* is on whether the actions taken by the breaching party unequivocally demonstrate repudiation. This focus is shown by the statements of that Court:

> Such a repudiation may be evidenced by *words* or voluntary *acts* but the refusal must be distinct, unequivocal and absolute.

Id. at 463 (emphasis added). The May 1, 1984 letter from Defendant's attorney could not be more absolute:

> Without arguing the meaning of the representations and warranties in paragraph 8, subsections (g), (k)(i) and (k)(ii), it is our position that the property must be accepted by the purchaser "as is." The Hastens will not reduce the purchase price due to the purchaser's inability to receive approval to construct 532 units on the Cypress Parcel. In light of the *reduced* density, would you please advise me immediately if Beznos Realty Investment Co. is not willing to close . . . " (emphasis added).

As Plaintiff correctly points out, this letter does not contain any promise to obtain additional units after the real estate closing. The absence of such language casts severe doubt on Defendant's representations that it was merely

complying with its own interpretation of the contract (to wit, that the units could be obtained after the closing). According to the letter, Plaintiff must close "as is" with the "reduced density" and fend for itself. This is absolute repudiation.

Defendant took a risk in repudiating the contract. It was fully well aware of such a risk. The May 1 letter from its own attorney expressly indicated no concern for what the contract meant. Defendant cannot now claim that it was relying upon one of two possible contract interpretations. Defendant is bound by the jury's determination that (1) its actions were wrongful, and (2) it repudiated the contract.

Defendant's Motion for a New Trial must be denied for all of these reasons.

V

Defendant claims that the judgment should be amended because of Paragraph 2 of the Judgment which orders it "to obtain density approval in accordance with paragraph 8(g) of the agreement." An amendment is purportedly needed because Defendant cannot know what to do when the Court has not construed Paragraph 8(g). Defendant's position must be rejected because the remainder of Paragraph 2 is actually quite specific. It requires Defendant to "obtain density approval . . . to permit the construction of 532 new multi-family residential units . . . no later than 60 days from the entry of this Judgment." Moreover, the jury has made it clear that Defendant breached its obligations under the contract.

Thus, Defendant must pay the costs of securing the density increase.

VI

Defendant has raised several grounds for amending the Judgment which involve imposing obligations upon Plaintiff.

Defendant initially contends that the terms of the Judgment do not specifically impose any time limitations on when Plaintiff must submit a site plan once a density increase is secured. Defendant also claims the Court should require Plaintiff to submit a site plan for the maximum number of units that are permitted by the density increase. However, in a Supplemental Motion for a Stay filed by Defendant, Deer Creek acknowledges it has not been able to secure the density increase in a timely fashion. Absent any modification of this Court's Judgment regarding the time allowed for the density increase, Defendant's two points here no longer require comment since there has been no increase.

Defendant further contends that an extension fee of two percent (2%) over the Chase Manhattan Bank prime rate should be paid by Plaintiff because of an agreement to pay such a fee for a one month extension of the closing date.[12] The Clarkson letter was written on April 27, 1984, and it sought to extend the original closing date of May 2, 1984 by thirty days. However, as Plaintiff points out, and

---

[12] *See* letter from Kenneth Clarkson to Steven Backer (Plaintiff's Exhibit 9).

as the jury appears to have concluded, Defendant anticipatorially repudiated the purchase agreement in its May 1, 1984 letter.[13] Thus, no extension ever went into effect. Defendant's request for this extension fee must be denied.

Defendant also seeks to have this Court retain jurisdiction to resolve any problems that may arise as it seeks the density increase. This Court will retain jurisdiction over these issues. Defendant's request on this point is granted.

In addition, Defendant claims that Plaintiff should pay interest at the contract rate of two percent (2%) over the prime rate through the date of closing. Defendant says that Plaintiff refused to close, and yet could have done so. This contention was rejected by the jury which determined that Defendant breached the contract. Closing did not occur because Defendant anticipatorially repudiated the agreement. Thus, Plaintiff has not received an undeserved windfall. It was Defendant who caused the two year delay by refusing to comply with the contract and requiring Plaintiff to obtain redress through the Court.

Defendant reiterates that the special verdict did not allow the jury to find that Plaintiff breached its obligations. However, this is not correct because the jury was carefully instructed on the elements of a breach of this contract and, as discussed earlier, would not have found a breach if Plaintiff had been obliged to secure the density increase.

---

[13] Plaintiff's Exhibit 7.

Defendant also contends that the jury's refusal to award damages is inconsistent with the decision by this Court to grant specific performance. This Court rejects Defendant's contention for the reasons which have been stated in its Memorandum Opinion and Order of October 31, 1986.

VII

Defendant seeks to stay the execution of this Judgment pending a resolution of these motions. Defendant has also filed a Supplemental Motion for Stay. Such a stay cannot be granted at this time because the Court has now resolved all of the pending motions.

IT IS SO ORDERED.

/s/ Julian Abele Cook
JULIAN ABELE COOK, JR.
United States District Judge

Dated: March 13, 1987
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAK, INC., a Michigan corporation,

Plaintiff

v.

DEER CREEK ENTERPRISES, an Indiana general partnership,

Defendant

Civil Action No. 84-CV-72370-DT

HON. JULIAN ABELE COOK, JR.

MEMORANDUM OPINION AN ORDER

This case involves a dispute over the last undeveloped parcel of land in the Deer Creek subdivision in Deerfield Beach, Florida. LAK brought suit, seeking damages and specific performance against Deer Creek for fraud and its purported failure to carry out the terms of a Purchase Agreement regarding the sale of land. On September 12, 1986, after a two week trial, the jury found that Deer Creek (1) did "materially breach" its obligations under the Purchase Agreement, and (2) had made a fraudulent misrepresentation to LAK. The jury decided not to award damages for the breach of contract or fraud claim. However, in a part of the jury verdict form, entitled "Specific Performance Advisory Verdict," the jury answered the following question in the affirmative: Do you recommend specific performance be awarded to LAK?[1]

---

[1] The jury's verdict on this issue is only advisory because specific performance is an equitable remedy.

This Court must now address the question of whether it will award specific performance to Plaintiff. To aid in this determination, the Court requested, and received, supplemental memorandum of law from both parties on the propriety of specific performance. This Court, having carefully read these memoranda, has decided that specific performance is appropriate for the reasons which have been set forth below.

1. HAS PLAINTIFF SATISFIED THE REQUISITE ELEMENTS FOR SPECIFIC PERFORMANCE?

In *Tipton v. Woodbury*, 616 F.2d 170, 178 (5th Cir. 1980), the court made clear that under Florida law, "the proof required both to establish a contract and specific performance as an appropriate remedy, is only that shown by the preponderance of the evidence."

First, LAK seeks to purchase real property which is unique. At trial, all of the witnesses admitted the special qualities of the land. The subject property is the last undeveloped parcel within the Deer Creek subdivision. The land is close to shopping and to the City of Boca Raton. Finally, there is a lake on the northern portion with cypress trees. Moreover, no remedy at law could be as efficient at bringing about justice for the Plaintiff as specific performance. *See Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 40 (8th Cir. 1975).

Second, LAK acted properly and in good faith, in that it has consistently expressed a desire to pay for the land pursuant to the contract terms or on a prorata basis. LAK also spent over $200,00 getting ready to perform.

Finally, LAK has been ready, willing, and able to fully perform under the Agreement. Financing was in place by April 27, 1984. No contrary evidence has been shown.

Accordingly, this Court concludes that LAK has clearly satisfield [sic] the three elements that are necessary for specific performance by a preponderance of the evidence.

2. WHAT FORM OF SPECIFIC PERFORMANCE SHOULD PLAINTIFF RECEIVE?

Florida case law supports specific performance with an abatement in the purchase price when there is a breach of warranty under a land contract. In *Black v. Clifton*, 284 So.2d 465 (Fla. 4th Dist. Ct. App. 1973), the court held that this was the appropriate kind of specific performance where the seller remains unable to fully perform the contract. The court noted that prohibiting specific performance because of an inability or a refusal to fully perform would allow a wrongdoer to reap the benefits of his own deficiency.

Furthermore, in *American Real Equities v. A.L.M. Investment Corp.*, 406 So.2d 507 (Fla. 3d Dist. Ct. App. 1981), the court clearly held that a purchaser may enforce a purchase agreement through specific performance and collect damages rather than seek a rescission of the contract. Here, despite of the seller's inability to perform because it did not get site plan approval for the requisite number of units, the purchaser has not elected to rescind the contract. For the proposition that an equity court may award abatement like damages which are incidental to the main relief, *see Miller v. Rolfe*, 97 So.2d 132 (Fla. 1957).

Thus, an abatement in addition to the specific performance, is permissible.

These cases provide the authority for the view by this Court that specific performance is appropriate. However, this Court concludes that Plaintiff is only conditionally entitled to an abatement in the purchase price. The abatement is conditioned upon Deer Creek not obtaining site plan approval by the City of Deerfield Beach and the County of Broward for the construction of 532 new multi-family residential units on this property within sixty days of entry of judgment. Should Deer Creek obtain such an approval, the abatement would be unnecessary.

This Court determines that if an abatement is necessary after the expiration of sixty days from the date of this Order, the abatement will be based on a per unit pro rata of the diminution in value which may be caused by the seller's failure to perform. *American Realequities* supports this position. In *American Realequities*, the purchase price was not prorated on the basis of the deficiency in the land acreage because the court found that (1) the sale was "in gross," and (2) the purchaser "was more interested in the number of units that could be constructed on the site than as to the gross acreage." *Id.* at 508. However, the court did impose a prorata abatement on the basis of the damages which had been caused by the seller's failure to disclose that plaintiff would be required to install a $150,000 lift station to pump water to the property. The proration was for that amount of the cost of the lift station which would represent that portion to be used by the property, with the rest to be paid by other property owners who would use the station. Here, as in *American Realequities*, the purchaser also focused on the units.

Unlike *American Realequities*, the deficiency was in the units. Thus, *American Realequities* strongly suggests that any abatement be a prorata reduction which would be based on the number of missing units.[2]

3. DO DEFENDANT'S OBJECTIONS TO SPECIFIC PERFORMANCE HAVE MERIT?

Defendant's central position is the jury's conclusion that (1) there was no damage (Jury Verdict Question IB), and (2) the fraudulent misrepresentation by Deer Creek was not the proximate cause of the injury to LAK (Jury Verdict Question IIIF) precludes an award of specific performance. Deer Creek claims that *Knowles v. CIT Corp.*, 346 So.2d 1042 (Fla. 1st Dist. Ct. App. 1977), stands for the proposition that a breach of contract under Florida law can be found only if a plaintiff was injured by the

---

[2] Defendant's argument (to wit, that an abatement is inappropriate because the value of the property has increased and not diminished) misses the point. Specific performance seeks to restore Plaintiff to the exact position that it would have been in *had* the sale been consummated. Had the sale gone through, Plaintiff would have obtained the 532 new units. The appropriate remedy is an abatement at the original price of what Plaintiff would be missing from the 532 units. Subsequent appreciation value is irrelevant.

Defendant's other argument (to wit, that it is entitled to an extension fee) is also meritless. An extension fee is only appropriate where the purchaser requests an extension of the closing. The jury verdicts (to wit, that Deer Creek did "materially breach" the Purchase Agreement and made knowing misrepresentations to LAK) hardly suggest that the delay which ensued is the fault of LAK.

breach.[3] Defendant further contends this Court so held in a colloquy with Plaintiff's counsel. *See* Defendant's Brief at 6. Defendant summarizes its own argument when it states that, "since the jury found that Plaintiff had not proven the element of injury, no breach of contract remedy is appropriate, let along specific performance." Defendant's Brief at 7. Defendant also says that the form of verdict was erroneous in allowing the jury to proceed to the question of specific performance, even after answering Question IB in the negative (i.e., no damage).

Defendant's reliance on *Knowles* is not on point. *Knowles* is an extremely brief *per curiam* opinion regarding a contract dispute where the court stated, in part, that:

> In order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of the evidence the existence of a contract, a breach thereof and damages flowing from the breach.

Id. at 1043. Such a statement is hardly arguable as a general proposition. However, the issue here is specific performance. Moreover, *Knowles* never specified that showing damages is an element of breach of contract. In fact, damages are specifically independent from a breach. Damages are a result of a breach – not an element of proof of a breach. *See* Plaintiff's Brief at 17-19. Thus, the jury could properly find that there was a breach of contract and, as [sic] the same time, conclude that the breach did not cause any damages.

---

[3] Paragraph 20 of the Purchase Agreement provides that it shall be governed by and construed according to Florida law.

Unlike *Knowles*, Plaintiff's reliance on *Coates v. Hale*, 429 So.2d 761 (Fla. 1st Dist. Ct. App. 1983) is on point. In *Coates*, the court directed specific performance of a land contract even though the evidence was insufficient to sustain an award of damages. *Coates* demonstrates that Florida also recognizes that the breach of a land contract is independent of the issue of damages. *Coates* also shows how the jury verdict form here was correct in having the jurors address the specific performance question, even after finding that no damages should be awarded.

Moreover, the jury was fully informed that damages and specific performance were in lieu of one another. This Court stated in Jury Instruction Number 48 that:

> If I grant the remedy of specific performance it will be in lieu of damages, and LAK will not be entitled to both remedies, and will not obtain such damages, if any, that you have awarded if I grant specific performance.

Thus, the jury's decision not to award damages is perfectly consistent with the award of specific performance by this Court. The decision of this Court with regard to specific performance is not based upon the jury's decision regarding damages. The jury and the lawyers were well informed of this fact.

This Court acknowledges that it may have been in error on Page 30, Paragraph 4, of the Jury Instructions when it stated that one of the elements of breach of contract was that "LAK suffered damages as a result of the breach of contract by Deer Creek." However, this error is harmless in that the law does not require this element to be proven. Thus, the jury's conclusion that LAK did not suffer damages does not change the fact that

the jury still found the other three elements of a breach present – these elements are all that is necessary.

For the above stated reasons, this Court awards Plaintiff specific performance in accordance with the attached judgment.

IT IS SO ORDERED.

/s/ Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
United States District Judge

Dated: Oct 31, 1987
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAK, INC., a Michigan corporation,

Plaintiff

v.

DEER CREEK ENTERPRISES, an Indiana general partnership,

Defendant

Civil Action No. 84-2370

HON. JULIAN ABELE COOK, JR.

JURY VERDICT
(Filed Sep. 12, 1986)

I. *LAK's First Claim (Breach of Contract)*

A. Did Deer Creek materially breach its obligations to LAK under the contract?

YES ✓ NO___

[Note: If your answer is "NO," do not answer any additional questions under I, and proceed directly to II. However, if your answer is "YES," proceed to answer the next question under I].

B. Did LAK suffer damages as the result of the breach of contract by Deer Creek?

Yes___ NO ✓

[Note: If your answer is "NO," do not answer any additional questions under I, and proceed directly to II. However, if your answer is "YES," proceed to answer the next question under I].

C. What is the amount of LAK's damages?

$___

[Note: Proceed directly to II].

II. *Specific Performance Advisory Verdict*

A. Do you recommend specific performance be awarded to LAK?

YES ✓ NO___

[Note: Proceed directly to III].

III. *LAK's Second Claim (Fraud)*

A. Did Deer Creek misrepresent to purchaser the number of new units that could be built on the Cypress Park property?

YES ✓ NO___

[If your answer is "NO," do not answer any additional questions under III, and proceed directly to IV].

B. Did Deer Creek make the representation knowingly and without regard for its truth or falsity or (2) tell LAK that it had knowledge that the representation was true, while not having such knowledge?

YES ✓ NO___

[If your answer is "NO" do not answer any additional questions under III, and proceed directly to IV].

C. Did LAK rely upon the representations by Deer Creek?

YES ✓ NO___

[If your answer is "NO," do not answer any additional questions under III, and proceed directly to IV].

D. Was LAK deceived by the representations of Deer Creek?

YES ✓ NO___

[If your answer is "NO," do not answer any additional questions under III, and proceed directly to IV].

E. Did LAK act with ordinary prudence in relying upon the representations by Deer Creek?

YES ✓ NO___

[If your answer is "NO," do not answer any additional questions under III, and proceed directly to IV].

F. Was the representation by Deer Creek the proximate cause of the injury to LAK?

YES___ NO ✓

[If your answer is "NO," do not answer any additional questions under III, and proceed directly to IV].

G. Did LAK suffer damages as the result of the fraud by Deer Creek?

YES___ NO___

[Note: If your answer is "YES," proceed to answer Question III(I) with your assessment of damages. However, if your answer is "NO," enter the sum of one dollar ($1.00) in Question III(I).

H. What is the amount of LAK's damages?

$___

[Note: Proceed directly to IV].

IV. *Summary*

A. Do you recommend specific performance be awarded to LAK?

YES ✓ NO___

B. Have you assessed damages in favor of LAK and against Deer Creek in the breach of contract claim?

YES___ NO ✓

[Note: Proceed to answer IV(C)].

C. Have you assessed damages in favor of LAK and against Deer Creek in the fraud claim?

YES___ NO ✓

[Note: If your answer is "NO" to IV(B) and IV(C), do not answer any additional questions. Have your foreperson sign and date the form. However, if your answer is "YES" to IV(B) and IV(C), proceed to answer IV(D)].

D. What is the total amount of damages to be assessed in favor of LAK and against Deer Creek?

$___

[Note: If you have answered IV(D), this jury verdict form should be signed and dated by your foreperson. Contact the bailiff of the Court and await further instructions].

/s/ Harry L. Dorms
Foreperson

Dated: 9/12/86

No. 89-1225

In The

Supreme Court of the United States

October Term, 1989

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOEL S. PERWIN
(Counsel of Record)
PODHURST, ORSECK, JOSEFSBERG
EATON, MEADOW, OLIN
& PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

JAFFE, SNIDER, RAITT & HEUER
Suite 2400,
One Woodward Avenue
Detroit, Michigan 48226
(313) 961-8380
(Counsel for Respondent)

February 26, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment oust the courts of a state (and the federal court sitting therein) of jurisdiction over a claim by that state's resident against a nonresident, for an alleged fraudulent misrepresentation in a contract for the sale of land in a third state, which was negotiated across state lines and signed by each party in its own state, where the defendant's only contacts with the forum were the interstate contract negotiations and the damage foreseeably caused to the plaintiff in the forum, where the court of appeals held that the district court had no personal jurisdiction to adjudicate the plaintiff's contract claims based upon the identical alleged misrepresentation, and where the plaintiff/petitioner has raised no challenge to that ruling?

TABLE OF CONTENTS

TABLE OF CASES

Page

TABLE OF CASES (Cont.)

TABLE OF CASES (Cont.)

TABLE OF CASES (Cont.)

No. 89-1225

In The

Supreme Court of the United States

October Term, 1989

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondent, Deer Creek Enterprises, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case. That decision is reported at 885 F.2d 1293, and is reprinted at pp. 1-30 of the petitioner's appendix ("App.").

STATEMENT OF THE CASE

Plaintiff/petitioner LAK, Inc. (a Michigan corporation), as the assignee of the executory contract right of the

Beznos Realty Investment Company (a Michigan co-partnership) to purchase a substantially-undeveloped tract of land in Florida from defendant/respondent Deer Creek Enterprises (an Indiana general partnership), sued Deer Creek in Michigan for specific performance or in the alternative for damages, asserting breach of contract and fraud. *See* App. Rec. ("Appellate Record") 1. Both claims were based upon the alleged breach of the same contract warranty – that "the Property is currently zoned to permit the construction of 532 units, and 532 units shall be available to the property in accordance with an appropriate site plan, as long as Purchaser complies with all appropriate laws and regulations governing the development of the Property" (*see* Pet. at 4-5 & n.4).[1]

Upon denial of Deer Creek's motion to dismiss for lack of personal jurisdiction (App. Rec. 14), the legal part of the case was tried before a jury in September of 1986, resulting in special verdicts finding that Deer Creek had misrepresented the number of dwelling units which might be constructed on the property, and had breached the contract warranty on that subject, but that Deer Creek was not liable on either count, because neither event was

---

[1] As the court of appeals noted (App. 9), and as both parties acknowledged at trial and on appeal, the property at all times was zoned to permit more than 540 units (8 existing units plus the proposed 532-unit project). The controversy centered on the question of whether the contract obliged Deer Creek, the seller, actually to secure local approval of a site plan for 532 additional units, or whether it merely constituted Deer Creek's warranty (the clause in question is found under the heading "Seller Representations and Warranties," *see* Pet. at 4) that 532 units "shall be available . . . as long as ***Purchaser*** complies with all appropriate laws and regulations" (our emphasis).

the proximate cause of any damage to the purchaser (App. Rec. 91).[2] Notwithstanding the jury's finding of no liability, it nevertheless executed an advisory verdict recommending specific performance of the contract (App. Rec. 91). Inexplicably, the district court accepted that recommendation (App. Rec. 92, 93).

Drawing no distinctions between the contract claim and the fraud claim, the court of appeals held that the

---

[2] Under Florida law, which both sides admitted governed both the contract and fraud claims, actual damage is an element of ***liability*** for breach of contract and fraud. *See Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir. 1983) (Florida law) (fraud); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1490 (11th Cir. 1983) (Florida law) (contract), *cert. denied*, 465 U.S. 1102 (1984); *Johnson v. Davis*, 480 So.2d 625, 627 (Fla. 1985) (fraud); *Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984) (fraud); *Stokes v. Victory Land Co.*, 99 Fla. 795, 128 So. 408, 410 (1930) (fraud); *Charter Air Center, Inc. v. Miller*, 348 So.2d 614, 616 (Fla. 2d DCA) (fraud), *cert. denied*, 354 So.2d 983 (Fla. 1987); *Knowles v. C.I.T. Corp.*, 346 So.2d 1042, 1043 (Fla. 1st DCA 1977) (per curiam) (contract); *McIntyre v. McCloud*, 334 So.2d 171, 172 (Fla. 3d DCA 1976) (per curiam) (contract); *Scott-Steven Development Corp. v. Gables By the Sea, Inc.*, 166 So.2d 763, 764 (Fla. 3d DCA 1964) (contract), *cert. denied*, 174 So.2d 32 (Fla. 1965). Both the district court's instructions and the verdict form reflect this requirement of damage, and the jury's verdict connotes its acceptance of the uncontradicted evidence that because the property already was zoned to accommodate the project, *see supra* note 1, the ministerial formalities of securing local approval presented no significant barrier. Indeed, as the court of appeals noted (App. 9-10), after suffering the district court's ruling, "Deer Creek promptly sought such approval, and later submitted evidence to the district court that on January 27, 1987, the Deerfield Beach City Commission decided to support construction of all of the additional units requested."

district court in Michigan had no specific jurisdiction over Indiana partnership Deer Creek, which had not purposefully availed itself of the privilege of transacting business in Michigan, and also that LAK's claims had no "connexity" to Deer Creek's tenuous contacts with Michigan. The relevant facts are stated in the court of appeals' opinion (App. 3-10). Deer Creek is an Indiana partnership which owns a piece of land in Florida, and has never transacted any business, maintained any office, or owned any property in Michigan (App. 3). It did not advertise the parcel for sale, "either in Michigan or elsewhere," but rather "received an unsolicited inquiry" from LAK's predecessor, Beznos Realty, a Michigan limited partnership (*id.*). All of the initial meetings took place in Florida, interspersed with telephone calls between Florida and Michigan (App. 3-4). Deer Creek's Indiana counsel subsequently dispatched a draft agreement to one of Beznos Realty's principals in Phoenix, Arizona, and a second copy to California (App. 5), and there followed a series of telephone conversations between Indiana and Beznos Realty personnel not only in Michigan, but in "Canada, Mexico, Texas, New York, Arizona and California" (App. 5). The court of appeals observed, "for whatever that datum may be worth," that "the majority of the lawyers' telephone calls . . . were originated not by the defendant's lawyers . . . but by . . . the lawyer for Beznos Realty" (App. 20). The final contract was signed by Beznos Realty in Michigan, and then was sent to Deer Creek in Indiana, where it was signed and thus "became legally binding" (App. 6). It calls for the application of Florida law (*id.*).[3]

---

[3] The court of appeals did not, as LAK asserts (Pet. at 12 & n.9), place disproportionate reliance upon the fact that the

(Continued on following page)

Beznos Realty provided a check for the earnest money, which was deposited in an Indiana bank, and subsequently secured a loan commitment from the Atlanta regional office of a Texas bank (App. 7). Following a dispute about which party was required to take the necessary steps in Florida to secure approval by the Florida local authorities of the number of condominium units to be built in Florida (App. 8-9), Beznos Realty assigned its interest in the purchase agreement to LAK, Inc., and two weeks ***before*** the deadline for closing, LAK filed the instant lawsuit in Michigan, charging anticipatory breach of contract and fraud (App. 10-11).

ARGUMENT

1. LAK is Correct in Conceding that the Court of Appeals Properly Found No Personal Jurisdiction Over Its Contract Claim Against Deer Creek.

Although LAK has discussed at length the Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (hereinafter *"Burger King"*), which defines the parameters of personal jurisdiction in the context of a contract dispute arising out of a commercial relationship (*see* Pet. 10-13), LAK's statement of the question presented references only its tort claim for fraud – not its contract claim – and under Rule 21.1(a) of the Rules of this Court,

---

(Continued from previous page)

contract was "made" in Indiana. That was only "a factor" – but not "determinative" (App. 19). Far more important, but also not dispositive, was the contract's prescription of Florida law (App. 6).

that is the only issue properly presented.[4] LAK's concession was appropriate, because there is no question that in the context of this commercial contractual dispute, Deer Creek did not "engage[] in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable." *Rush v. Savchuk*, 444 U.S. 320, 329 (1980).

As the court of appeals recognized (App. 20), that criterion focuses upon the ***defendant***'s purposeful behavior vis-a-vis the forum state – not the plaintiff's[5] – and thus the fact that Beznos Realty drew its earnest-money deposit from a Michigan bank (*see* Pet. at 5) or itself "executed the agreement . . . in Michigan" (Pet. at 12 n.9) are constitutionally irrelevant. Only "the defendant *himself* [can] create a 'substantial connection' with the forum state," *Burger King*, 471 U.S. at 475 (emphasis in original), and the Court has held that the mere existence of an interstate contract is insufficient to evidence the defendant's purposeful availment of the benefits and protection of the forum state's laws: "If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." *Burger King*, 471 U.S. at 478

---

[4] *See Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954); *Irvine v. California*, 347 U.S. 128, 129 (1954).

[5] "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirements of contact with the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), *quoted in Burger King*, 471 U.S. at 474-75, *and Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

(emphasis in original). Indeed, any other conclusion would construe the due process clause to extract a concession of jurisdiction as the inherent price of doing business across state lines – a price which LAK has candidly admitted is inherent in its position (Pet. at 13) ("Deer Creek . . . had ample opportunity to avoid [Michigan] jurisdiction by simply refusing to deal with Beznos"). This Court has expressly declared otherwise, and two key corollaries flow from that declaration, which in turn rebut the only two contacts with Michigan which LAK has attributed to Deer Creek.

First, if an interstate contract alone cannot confer jurisdiction, it necessarily follows that the interstate negotiations which attend the contract's formation are also insufficient, because they signal the "mere fortuity that the plaintiff happens to be a resident of the forum." *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 497 n.26 (5th Cir. 1974). While "the nature of [the defendant's] communications with the resident party are relevant," "because they provide a clue to the significance attached by the defendant to the activities occurring within the forum state – and thus a clue as to his expectations," *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 (6th Cir. 1972), the mere fact of "an exchange of communications between a resident and nonresident in developing a contract is insufficient of itself to be characterized as purposeful activity invoking the benefits and protection of the forum state's laws."[6]

---

[6] *Stuart v. Spademan*, 772 F.2d 1185, 1193 (5th Cir. 1985). *Accord, Davis v. American Family Mutual Ins. Co.*, 861 F.2d 1159

(Continued on following page)

Second, if the existence of an interstate contract is insufficient to confer jurisdiction, it necessarily follows that the mere foreseeability that a breach of that contract will cause injury in the forum state (which of course is

---

(Continued from previous page)

(9th Cir. 1988); *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40, 43 (8th Cir. 1988); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 815-17 (9th Cir. 1988); *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415, 1418, 1420 (10th Cir. 1988); *Caldwell v. Palmetto State Savings Bank of South Carolina*, 811 F.2d 916, 918 (5th Cir. 1987) (per curiam); *Nicholas v. Buchanan*, 806 F.2d 305, 307 (1st Cir. 1986), *cert. denied*, 481 U.S. 1071 (1987); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987); *Borg-Warner Acceptance Corp. v. Lovett & Thorpe, Inc.*, 786 F.2d 1055, 1062 n.4 (11th Cir. 1986); *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 932-35 (1st Cir. 1985); *Institutional Food Marketing Assoc. v. Golden Strawberries, Inc.*, 747 F.2d 448, 456 (8th Cir. 1984); *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1248 (9th Cir. 1984); *Hydrokentics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984); *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 656 (8th Cir. 1982); *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309, 312, 314 (8th Cir. 1982); *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980); *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 604 (7th Cir. 1979), *cert. denied*, 444 U.S. 907 (1980); *Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 187-88 (5th Cir. 1978), *cert. denied*, 451 U.S. 910 (1981); *Aaron Ferer & Son v. Atlas Grap Iron & Metal Co.*, 558 F.2d 450, 453 (8th Cir. 1977); *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723, 729-30 (5th Cir.), *cert. denied*, 414 U.S. 830 (1973); *Hamilton Brothers, Inc. v. Peterson*, 445 F.2d 1334, 1336 (5th Cir. 1971); *Smith v. Piper Aircraft Corp.*, 425 F.2d 823, 825 (5th Cir. 1970); *Scheidt v. Young*, 389 F.2d 58, 60 (3d Cir. 1968); *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F.2d 583, 587 (2d Cir. 1965).

foreseeable in every interstate contract) is likewise insufficient. And indeed, "the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction."[7] To the contrary, "purposeful availment" is shown only if "the defendant 'deliberately' has engaged in significant activities within a State . . . or has created 'continuing obligations' between himself and residents of the forum . . . ."[8] Thus in *Burger King*, it was not the fact of the interstate contract which conferred jurisdiction, but the character of that contract:

> Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. . . . Upon approval, he

---

[7] *Burger King*, 471 U.S. at 474, *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). *Accord, Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 109 (1987); *Calder v. Jones*, 465 U.S. 783 (1984).

[8] *Burger King*, 471 U.S. at 475-76, *quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984), *and Travelers Health Ass'n v. Commonwealth of Virginia*, 339 U.S. 643, 648 (1949). *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297 ("isolated occurrence" insufficient); *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 320 (1945) ("isolated" and "unilateral acts" insufficient); *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 934 (1st Cir. 1985) (defendant's contacts must reflect "a purposeful decision by the nonresident to 'participate' in the local economy and to avail itself of the benefits and protections of the forum").

> entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random", "fortuitous" or "attenuated." 471 U.S. at 479-80.

In contrast, as the court of appeals noted (App. 23), "[n]o such [long-term] relationship was created by the real estate purchase agreement with which we are concerned." The contract here was a "one-shot operation," *Sea-Lift, Inc. v. Refinadora Costarricense De Petroleo, S.A.*, 792 F.2d 989, 994 (11th Cir. 1986), which established "[n]o continuing business relationship," *Pickens v. Hess*, 573 F.2d 380, 386 (6th Cir. 1978), and which, "[i]n contradistinction to the contract at issue in *Burger King* . . . did not contemplate a long-term relationship with the kinds of continuing obligations and wide-reaching contacts envisioned by the *Burger King* contract." *Stuart v. Spademan*, 772 F.2d 1185, 1194 (5th Cir. 1985). Thus, when "arrayed against the rich fabric of contacts in *Burger King*, the record in this case is clearly insufficient to support jurisdiction." *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 935 n.4 (1st Cir. 1985). From the perspective of the Indiana partnership which accepted an unsolicited offer to sell a piece of property in Florida, the buyer's residence in Michigan was entirely fortuitous. The locus of the contract was Florida, the parties' face-to-face negotiations all took place in Florida, the contract called for the application of Florida law, and the closing was to occur in

Florida. On the contract claims, at least, LAK was right to concede the correctness of the court of appeals' holding.

2. The Foregoing Conclusions Are Not Altered by the Addition of Tort Claims Based Upon the Same Activities Asserted to Constitute a Breach of Contract.

Having declined to argue the jurisdictional question in the context of the contract dispute, LAK has asserted that its claim of "fraud [which assertedly] was contained in the agreement itself" (Pet. at 12 n.9) somehow rescued an otherwise-invalid exercise of federal power, because this Court's "decisions establish that a defendant has sufficient contacts with the jurisdiction when it commits a tort knowing that it will have adverse consequences on a plaintiff resident of that jurisdiction" (Pet. at 8). That assertion is simply wrong.

As we have noted, *Burger King* held directly that the mere "foreseeability of causing *injury* in another State . . . is not a 'sufficient benchmark' for exercising personal jurisdiction." 471 U.S. at 474. At least three analogous statements are found in tort cases: *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297 (in products-liability action, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"); *Calder v. Jones*, 465 U.S. 783, 789 (1984) (in libel case, defendants are correct that "[t]he mere fact that they can 'foresee' that the article will be circulated and have an effect in California is not sufficient for an

assertion of jurisdiction"; but "petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California"); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (in product liability case, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State").

In the light of these decisions, LAK's discussion (Pet. at 8-10) of *Calder* and of *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), is seriously misplaced. In both *Keeton* and *Calder*, the offending publication was mass-distributed throughout the forum state, and thus the alleged tortious conduct itself took place within the forum. The forum state in *Keeton* had "jurisdiction over those who commit torts within its territory," 465 U.S. at 776; and in *Calder*, the defendant's "intentional, and allegedly tortious, actions were expressly aimed at" the forum, and thus the forum was "the focal point both of the story and of the harm suffered." 465 U.S. at 789. Although tort and contract claims are obviously different in some respects, the message of *Keeton* and *Calder* is that the minimum-contacts analysis is essentially the same, and that where the defendant has not insinuated himself into the life of the forum, "[t]he mere fact that [the defendant] communicated with [the plaintiff] in the state, and may have committed a tort in the exchange of correspondence, does not show that [the defendant] purposefully availed itself of the privilege of conducting business in [the forum]." *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1248 (9th Cir. 1984).

To the contrary, even in tort cases, the defendants must have "directed their actions toward the forum state," and "intended the brunt of the injury to be felt in [the forum state]." *Hugel v. McNell*, 886 F.2d 1, 5 (1st Cir. 1989).[9]

---

[9] *Accord, American Express International, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1179-80 (1st Cir. 1989); *Cycles, Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612, 619 (5th Cir. 1989); *FDIC v. Lake Shore Inc.*, 886 F.2d 654, 657-60 (4th Cir. 1989); *Davis v. American Family Mutual Ins. Co.*, 861 F.2d 1159, 1163 (9th Cir. 1988); *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40, 43 (8th Cir. 1988) (per curiam); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 815-17 (9th Cir. 1988); *Eveland v. Director of Central Intelligence Agency*, 843 F.2d 46, 50 (1st Cir. 1988) (per curiam); *Saylor v. Dyniewski*, 836 F.2d 341, 343-44 (7th Cir. 1988); *Rittenhouse v. Mabry*, 832 F.2d 1380, 1384 (5th Cir. 1987); *Federal Deposit Ins. Corp. v. British-American Ins. Co.*, 828 F.2d 1439, 1442-43 (9th Cir. 1987); *Caldwell v. Palmetto State Savings Bank of South Carolina*, 811 F.2d 916, 917-18 (5th Cir. 1987) (per curiam).

LAK has suggested (Pet. at 7, 12 n.9) that the court of appeals itself distinguished between the tort and contract claims, in its *dictum* (App. 25-28) that LAK might have shown "connexity" by proving that Deer Creek's alleged misrepresentations had actually been made in the forum, or at least in communications to the forum. In contrast, the court of appeals noted, "[t]here was no showing that any misrepresentations were made" in such communications (App. 27). This suggestion concerned only the "connexity" requirement, and had nothing to do with the appellate court's independent conclusion that Deer Creek had not purposefully availed itself of the benefits and protections of the forum. Moreover, the court's *dictum* may not have been directed toward the constitutional question, but only toward the proper construction of Michigan's long-arm statute, or its substantive tort law. *See* App. 14 n.4 ("Michigan may have stopped short of the constitutional limit, however, as far as actions for tort are concerned"); App. 27, *quoting Serras v. First Tennessee Bank N.A.*, 875 F.2d 1212,

(Continued on following page)

For the same reasons that the court of appeals was correct to find no personal jurisdiction over the contract claim, there was no jurisdiction over the tort claim, which was based on precisely the same conduct. We understand that on a subject like this one, which is inherently fact-dependent, there are few answers "in black and white. The grays are dominant and even among them the shades are innumerable." *Estin v. Estin*, 334 U.S. 541, 545 (1948). But as the court of appeals recognized, the instant case does not lie in the shadows of the present discourse on this subject, but in the clear sunlight of established principles. It presents no issue warranting this Court's attention.

(Continued from previous page)

1218 (6th Cir. 1989) ("The alleged fraudulent misrepresentations practiced upon plaintiffs within Michigan, both in the phone calls and during the visit of the Bank's agent, are an *element* of the cause of action itself") (emphasis in *Serras*). Indeed, apart from constitutional requirements, a number of states appear to have limited their own substantive or jurisdictional requirements to torts actually committed within the state. *See, e.g., American Express International, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1179 (1st Cir. 1989); *Cycles, Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612, 619 (5th Cir. 1989); *Davis v. American Family Mutual Ins. Co.*, 861 F.2d 1159, 1162 (9th Cir. 1988); *Rittenhouse v. Mabry*, 832 F.2d 1380, 1384 (5th Cir. 1987). Therefore, this case does not present the constitutional question of whether jurisdiction can never be proper in the forum if the alleged tortious conduct took place somewhere else. The court of appeals properly found it unnecessary to reach that question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOEL S. PERWIN
(Counsel of Record)
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN
& PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

JAFFE, SNIDER, RAITT & HEUER
Suite 2400,
One Woodward Avenue
Detroit, Michigan 48226
(313) 961-8380
(Counsel for Respondent)

February 26, 1990

No. 89-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF FOR PETITIONER

D. MICHAEL KRATCHMAN
(Counsel of Record)
2500 Buhl Building
535 Griswold
Detroit, Michigan 48226
(313) 963-9625
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1225

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF FOR PETITIONER

ARGUMENT[1]

1. (a) The greater part of Respondent's Argument is devoted to defending the Court of Appeals' ruling that the District Court lacked jurisdiction over Petitioner's claims for breach of contract. Br. Opp. at 5-11.[2] Re-

---

[1] Throughout this Reply Brief, "Pet." will refer to the Petition for a Writ of Certiorari in this case; "App." will refer to the separately-bound Appendix to the Petition; "Br. Opp." will refer to the Brief in Opposition to the Petition filed by Respondent.

[2] Likewise, beside the point is Respondent's challenge to the District Court's decision on the merits. Br. Opp. 2-3. Any such matters will, of course, be open to Respondent if the District Court's jurisdiction over the fraud claim is sustained on certiorari.

spondent takes this course although, as it says, "LAK's statement of the question presented references only its tort claim for fraud * * *, and under Rule 21.1(a) of the Rules of this Court, that is the only issue properly presented." *Id.* 5-6. In thus concentrating its fire on the breach-of-contract issue, although it is not presented here, Respondent assumes that the same constitutional standard applies with respect to jurisdiction over a defendant on a claim for intentional tort. See, *e.g.*, Br. Opp. 14: "For the same reasons that the court of appeals was correct to find no personal jurisdiction over the contract claim, there was no jurisdiction over the tort claim, which was based on precisely the same conduct." This approach emulates that of the court below (see *id.* 3: "Drawing no distinctions between the contract claim and the fraud claim, the court of appeals held * * *.") It is, however, fundamentally inconsistent with the decisions of this Court.

Because "an individual's contract with an out-of-state party alone [cannot] *automatically* establish sufficient minimum contacts in the other party's home forum", *Burger King* v. *Rudzewicz*, 471 U.S. 462, 478 (1985) (emphasis added), the Court of Appeals' dismissal of the breach-of-contract claim is too fact-driven to qualify for certiorari.[3] In sharp contrast, however, is the constitutional standard with respect to intentional torts, for the rule in such cases in that the defendant is subject to suit in the State of plaintiff's residence if the defendant knows he would be injured there. *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984); *Calder* v. *Jones*, 465 U.S.

---

[3] It is only for this reason that the Petition did not seek review of that determination. We readily agree that we are precluded from further litigating the contract claims, but Respondent errs in contending that Petitioner has thereby conceded the *correctness* of their dismissal. Br. Opp. 5-6, 11.

783, 788-89 (1984). See Pet. 8-10. The Court of Appeals' holding to the contrary therefore raises a pure question of federal law which merits review.[4]

(b) When Respondent finally addresses the issue as to which certiorari is sought, it observes that "even in tort cases, the defendants must have directed their actions toward the forum state and intended the brunt of the injury to be felt in [the forum state]." Br. Opp. 13, quoting *Hugel* v. *McNell*, 886 F.2d 1, 5 (1st Cir. 1989). We agree. See Pet. 11-13. In *Hugel*, the Court of Appeals captured the essential point:

> The knowledge that the major impact of the injury would be felt in the forum State constitutes a purposeful contact or substantial connection whereby the intentional tortfeasor could reasonably expect to be haled into the forum State's courts to defend his actions. [886 F.2d at 4.]

Both in its articulation of the constitutional standard and in sustaining the plaintiff's residence jurisdiction over the nonresident tortfeasor, the First Circuit's decision in *Hugel* directly conflicts with that of the Court of Appeals in this case. The reason for this conflict is, of course,

---

[4] We note briefly that two points made by Respondent further illustrate the substantive differences between these constitutional standards.

1) Whereas the fact that "the plaintiff happens to be a resident of the forum" is insufficient to justify jurisdiction of a contract claim (Br. Opp. 7), a defendant who injures the plaintiff at his residence by an intentional tort does have a constitutionally sufficient contact with that jurisdiction. See *Calder*, 465 U.S. at 789-90 (1984), quoted at Pet. 9-10.

2) Conversely, although the existence or nonexistence of a long-term business relationship is a factor to which the Court attached great significance with respect to contract actions in *Burger King*, 471 U.S. at 479-80 (see also Br. Opp. 9-10), it is unnecessary for jurisdiction over a claim for an intentional tort, which is ordinarily a "one-shot operation" (*id.* 10).

that the First Circuit in *Hugel* followed *Calder* (*id.*), whereas the court below failed to do so.

As we showed at Pet. 11-13, the Court of Appeals misunderstood the requirement that the defendant has directed its attention to the forum state, and consequently seized on irrelevancies. See App. 18-19, quoted at Pet. 12; App. 20, quoted at Br. Opp. 4.[5] Respondent does likewise, asserting: "From the perspective of the Indiana partnership which accepted an unsolicited offer to sell a piece of property in Florida, the buyer's residence in Michigan was entirely fortuitous." Br. Opp. 10. This argument misapplies the "fortuity" concept as it has been explained by this Court. Whatever may have been Respondent's "perspective" before it entered into negotiations with Beznos Realty, once it did so knowing that Beznos was a Michigan entity it was entirely foreseeable—indeed, inevitable—that any fraud committed on Beznos would have its impact in Michigan.[6] Thus, Respondent's contacts with the Michigan forum "proximately result[ed] from actions by the defendant *himself*." *Burger King*, 471 U.S. 475, emphasis in original. More fundamentally, the element of intent, with knowledge that tortious injury will be inflicted on the plaintiff at his residence, eliminates any element of "fortuity;" this differentiates products liability cases like *World-Wide Volkswagen Corp.* v.

---

[5] Respondent is understandably embarrassed by the Court of Appeals' reliance on the circumstance that the contract between the parties here was last signed in Indianapolis and did not become binding until then. See App. 27, quoted at Pet. 12. But there simply is no basis in that Court's opinion for Respondent's treatment of this portion of the Sixth Circuit's opinion as "*dictum*," and as a mere interpretation of the Michigan long-arm statute. Br. Opp. 13-14, n.9.

[6] By contrast, Respondent had no way of knowing that Beznos Realty personnel would be in "Canada, Mexico, Texas, Arizona and California." Br. Opp. 4. Therefore, the limits on jurisdiction enunciated by this Court would have precluded suit against Respondent in those jurisdictions.

Woodson, 444 U.S. 286, 295-98 (1980), where the defendant did not expect or intend that its negligence would cause injury in the forum state, although such injury was "foreseeable." See *Hugel*, quoted at p. 3, *supra*.

The short of the matter is that the Court of Appeals and Respondent have failed to appreciate that the "purposeful availment" test (and its other formulations), are firmly rooted in "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). See Pet. 8, 13. Respondent has not even asserted, let alone demonstrated, that it was "unfair" or contrary to substantial justice for the federal court in Michigan to exercise jurisdiction over Respondent on Petitioner's claim for intentional fraud.

2. Respondent does not deny that the question presented by this Petition is one which arises with great frequency in the lower state and federal courts. Indeed, it is reasonable to assume that the array of appellate decisions at Br. Opp. 12-13, and especially n.9, is but the tip of the iceberg. We submit that a decision like that of the court below which is inconsistent with this Court's precedents will inevitably create confusion and invite unnecessary jurisdictional litigation and should not be permitted to stand. Pet. 13.

Proceeding from its assumption that there is a "judicially imposed requirement that each and every question of personal jurisdiction over a non-resident defendant be decided 'on its own facts'" (App. 28, n.7), the court below said: "More sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it—and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions that counsel choose to fight out in court." *Id.* Thus, even if, notwithstanding what we (and the First Circuit in *Hugel, supra*) consider to be the clear import of *Keeton*

and *Calder*, this Court has not already established that the State of a plaintiff's residence has jurisdiction to remedy an intentional tort which injures him there, certiorari should be granted to resolve the issue for the guidance of the lower courts.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

D. MICHAEL KRATCHMAN
(Counsel of Record)
2500 Buhl Building
535 Griswold
Detroit, Michigan 48226
(313) 963-9625
Attorney for Petitioner